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PRACTICAL TREATISE

ON

THE LAW

OF

COVENANTS FOR TITLE,

BY

WILLIAM HENRY RAWLE.

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PHILADELPHIA:

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TO
WILLIAM RAWLE, ESQ.,
THIS WORK IS DEDICATED,
BY HIS SON.

P R E F A C E .

THIS work is devoted to the consideration of the liabilities and rights of vendors and purchasers of real estate, arising from their Covenants for Title. As such covenants are, in some shape or form, introduced into nearly every conveyance of real estate, on both sides of the Atlantic, it is hoped that the Profession may not deem unnecessary a work which has for its object their analysis and practical effect.

The subject is believed to possess a peculiar importance in this country. In England, the elaborate language in which these covenants are clothed, almost precludes a question as to their construction and operation. But our system of conveyancing is, in many important particulars, far less artificial, and the difference is in no respect more strikingly shown than in the form in which the covenants for title are expressed. The covenant of warranty, moreover, which is there almost unknown at the present day, is here more frequently employed than any other. The earlier settlers of our colonies left their mother country about the time when the modern system of law, which may be said to have had its rise at the end of the reign of Henry the Seventh, had, towards the latter part of that of Charles the Second, assumed something of a regular form. Of the changes which marked this period the discontinuance of real actions was one. The ancient warranty was nearly out of use, and the modern covenants were not fully in use; and at this time, if we

may judge from the scanty authority on the subject, the covenant of warranty was introduced, and seemed to hold a middle ground between the old warranty on the one hand, and the modern covenants on the other; and although superseded in England by the latter, it was brought to this country by our ancestors, and has since, throughout its breadth, been extensively used, and become, perhaps, the principal covenant for title.

The following arrangement of this subject has been adopted. The ancient warranty and the introduction of covenants for title—the covenant for seizin—the covenant of right to convey—the covenant against incumbrances—the covenant for quiet enjoyment—the covenant for further assurance—and the covenant of warranty, are considered in detail and separately, with the examination, in the respective chapters, of the peculiarity and attributes of each covenant, its form, definition, scope, and measure of damages. Then is considered the extent to which covenants for title run with the land—their operation by way of estoppel or rebutter—the doctrine of implied covenants for title, including the effect given to the words “grant, bargain, and sell,” by statutory local enactments, and the extent to which covenants for title, whether express or implied, may be limited or qualified, either by the insertion of other covenants or by other clauses of a deed—the covenants which a purchaser has a right to expect, and which a vendor is bound to give—the liabilities and rights of the covenantor and covenantee, the heir, the devisee, the executor, or administrator, and the assignee; and lastly, the right of the purchaser, at law and in equity, to detain or reclaim the purchase money after the execution of the deed.

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COVENANTS FOR TITLE.

CHAPTER I.

THE ANCIENT WARRANTY, AND THE INTRODUCTION OF COVENANTS FOR TITLE.

THE introduction and use of "covenants for title" in place of the common law warranty, was one of the earlier of what may be termed innovations upon that system, which has had such able and devoted admirers. The change was felt to be so needed, and the alteration was so little startling, that it excited none of those anxious misgivings which have since accompanied less material changes, and Sir Orlando Bridgman, to whom has been ascribed the introduction of these covenants into general practice, seems to have had his professional eminence as a common law judge, undisturbed by any imputation of an undue desire to reform. Yet with the introduction of covenants for title, one of the most abstruse and subtle subjects in the system of law has been withdrawn from the attention of the practitioner. This is especially the case in America. If in England, the more pliable forms of covenant were found better suited to carry into effect the intentions of the parties, in their accommodation to the various circumstances connected with real estate titles, than the complex and sometimes dangerous system of warranty, such must have been found

peculiarly the case in this country, where the absence of the law of primogeniture would, of itself, have prevented the application of the doctrine, with all its common law incidents.

A sketch however, of the law as it formerly was, in this respect, may not be unnecessary to an adequate comprehension of the system which has superseded it. By the feudal constitution, if the vassal's title to the fee which he had received at the hands of his lord, were disputed, he might call upon the lord or donor to warrant or insure his gift, which, if he failed to do, and the vassal were evicted, the lord was bound to give him another feud of equal value in recompense—in other words, as the feudal system imposed upon the grantee the duties of tenure, it also bound the lord, by a reciprocal obligation, either to protect the tenant in his fief, or to give him another—a liability which descended to the heir of the grantor as long as he had any lands to answer it.¹ This warranty was originally created without any covenant to that effect—subsequently, when a deed accompanied the gift, the word of feoffment, “dedi,” implied a warranty. As early as 1272, the statute *de bigamis*² was declaratory of the effect attached by the common law to the use of this word. “In deeds where is contained *dedi et concessi* without homage or without a clause that containeth warranty, and to be holden of the givers and their heirs by a certain service; it is

¹ Sir Martin Wright, in his introduction to the laws of tenures, pp. 27-32, &c., seems to think this could only have been so, in the case of improper feuds, and that it was unlikely that where a feud was generously given, the lord should be held to make good its loss; the question has been much discussed by the civilians, but the weight of authority seems to be as I have stated it above. See Mr. Butler's note to Co. Litt. 365.

² 4 Edw. I. c. 6.

agreed that the givers and their heirs shall be bound to warranty;”—“and even if there be,” says Coke in his remarks on this statute,¹ “An express warranty in the deed, yet that taketh not away the warranty that is wrought by force of the word *dedi*, but the feoffee may take advantage either of the one or the other at his pleasure.”²

The reason for this would seem to be that warranties which naturally flow as part of the reciprocal consequences of feudal tenure, cannot be modified by express warranties.

The second clause of the statute modified the common law, by declaring that “where is contained *dedi et concessi*, to be holden of the chief lords of the fee or of others, and not of feoffors, or of their heirs, reserving no service, without homage, or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life, by force of his own gift, shall be bound to warrant”—in other words, where no tenure between the grantor and grantee was created by the gift, the word *dedi* implied a warranty merely by the donor during his life, and not one which would impose an obligation on his heirs.

A few years after, the statute of *quia emptores* prohibited subinfeudation by declaring that it should be lawful for every freeman to sell his lands at his own pleasure, and that the feoffee should hold the lands

¹ 2 Institutes, 275.

² This is the earliest instance of statutory enactment bestowing a certain signification to words of conveyance, and may not unreasonably be presumed to have afforded the precedent for the statute of 6 Anne, c. 35, giving a certain effect to the words “grant, bargain and sell,”—an act which has been adopted either literally, or in substance, in many of our States. See Chapter X.

³ 18 Ed. I. c. 1.

of the chief lord of the fee, by such service and customs as his feoffor was bound to before. This put an end to homage as an incident of tenure, which was the consideration of implied warranty, and it was from thence well understood, that the word *dedi*, in a conveyance in fee, merely implied a warranty during the life of the donor. If, however, the conveyance left any reversion in the donor, the implied warranty still subsisted, since the donee still held of the donor as before the statute, and consequently the warranty bound not only the donor but also his heirs.¹

As warranty by implication thus became in many instances a mere personal contract, instead of a real security annexed to the estate granted, the practice of introducing express warranties, (which though sometimes employed before that time, were by no means general,) became almost universal. Their effect was two-fold. First, the grantee could call upon his donor to defend his title to the land, and could recover an estate of equal value in case of eviction. And secondly, the warranty operated as a rebutter, by barring the warrantor and his heirs from claiming any portion of the estate so granted with warranty. Every warranty which descended upon the heir of the warrantor was operative to prevent the heir from recovering back any lands against the warranty of his ancestor. The law of warranty and the law which gave the entire inheritance to the eldest son were coeval. Still, there might be cases in which this estoppel of the heir's claim would work

¹ The word "give" is seldom or never used in modern conveyancing, but in the event of its introduction into a conveyance passing any estate in land, in those parts of this country in which the statute of *quia emptores* is not in force, (as in Pennsylvania), these remarks might become of practical importance.

a hardship to him. A man might be tenant by the curtesy and alien the lands thus held with warranty, which warranty descending upon the son would estop him from claiming the inheritance which he would otherwise have derived from his mother. The statute of Gloucester,¹ therefore, in this case restrained the effect which a warranty would otherwise have, by giving to the heir the right to claim the estate notwithstanding such warranty.

Into the difficult and unsatisfactory learning connected with what have been termed lineal and collateral warranty, it is not necessary now to enter. They were terms unknown to the common law. There was no difference between them. No statute recognized the distinction until more than four centuries after they were first spoken of, and then only to sweep off the intricacies which the distinction had caused. A few words will trace its origin.

The statute *de donis*,² by removing the estates of the greater lords beyond the penalties of forfeiture, swelled them to a height which was as unpalatable to the crown, as it was galling to the trading and industrious classes. Nor was it less distasteful to the younger sons, who, in consequence of the unalienable nature of the estates in tail which the statute created, were without provision from their fathers, the tenants in tail. All saw the mischief when it was too late. In every successive parliament, from Edward the First to Edward the Fourth, bills were introduced to repeal the statute *de donis*, but the power of the great lords resisted these attempts with success. There was then nothing left but to elude the statute by every ingenuity which lawyers and

¹ 6 Ed. I. c. 3.

² 13 Ed. I. c. 1.

judges could devise. The first means was by collateral warranty.

If lands were entailed upon a father and his heirs male, and the father aliened with warranty, this warranty, though it would descend upon the son, still would not debar him from claiming the land of his father's alienee, for the statute *de donis* expressly declared, that the tenants in tail should "have no power to alien the land so given, but that it should remain unto the issue of those to whom it was given after their death." But if the brother of this tenant in tail, who had nothing to say to it, who was collateral in respect to it, joined in this alienation with warranty, or released to the alienee with warranty, and died without issue, so that the son of the tenant in tail became his heir, this warranty, called collateral to the entail, bound, as at common law, the son of the tenant in tail; therefore, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation, and bind himself and his heirs to warranty, in particular cases relief was obtained from the statute *de donis*. All efforts to counteract this ingenuity failed.¹ Nearly two centuries elapsed

¹ Littleton, § 720, speaks of one Jude Richel who created a tenancy in tail with remainder to his second and other sons successively in tail, and provided that in case of alienation by any tenant in tail the estate should immediately vest in the next tenant in remainder. This, he thought, would effectually preserve the entail in its purity, for the first estate would, upon alienation, immediately determine, and the second commence before any collateral warranty could descend upon it. But if these conditions had been held effectual, it was easy to perceive that henceforth all tenancies in tail would be accompanied by similar restrictions. Consequently, all these remainders were held to be void upon grounds more of technicality than reason; and the satisfaction of Littleton at this triumph is echoed by Coke, who holds up "such novelties" as examples, to show that "new inventions in the assurances of the law are dangerous." Such a contest also took place after the statute of Hen. VII. declared that fines levied with proclamation should

before collateral warranties, as a means of evading this statute, were succeeded by fines and recoveries, which, invented at first to evade the statutes of mortmain, were fitly turned, after their office in that respect had been suddenly checked, to elude the statute *de donis*.¹ It is not difficult to imagine that the doctrine of collateral warranty, sprung from such an origin, and used for such purposes, should in the course of centuries be involved in subtlety, and, says Chief Justice Vaughan, "If Littleton had taken the plain way of resolving his many excellent cases in his chapter of warranty, by saying, the warranty of the ancestor does not bind in this case, because it is restrained by the statute of Gloucester or the statute *de donis*, and it doth bind in this case as at the common law, because not restrained by either statute, (for when he wrote, there were no other statutes restraining warranties, there is now a third—11 Hen. VII.) his doctrine of warranties had been more clear and satisfactory than it now is, being intricated under the terms of lineal and collateral, for that in truth is the genuine resolution of most if not all his cases."² The statute of Henry the Seventh,³ to which Lord Vaughan here refers, is similar in its protecting influence to the statute of Gloucester, and declares in substance, that a warranty by a tenant in dower, a tenant for

be conclusive to bar estates tail. Similar conditions were imposed in the creation of the entail, and were similarly disposed of.

¹ This arose from Taltarum's case, 12 Ed. IV. case 25, and it is a remarkable instance of how the original meaning of a statute can be overlaid with the pertinacious interpretations affixed to it, that the power to suffer a common recovery has been repeatedly held to be "a privilege *inseparably incident* to an estate tail," and one which cannot be restrained by condition, limitation, custom, recognizance, statute or covenant. See the argument of Mr. Knowler in *Taylor v. Horde*, 1 Burrow, 84.

² Vaughan's Rep., 375.

³ 11 Hen. VII. c. 20.

life, a tenant in tail, jointly with her husband, of lands derived from his ancestor, shall be void against the heirs next inheritable, unless done with their consent. To these restricting statutes was added that of 4 & 5 Anne, c. 16, by which all warranties by any tenant for life are made void against those in remainder and reversion, and all collateral warranties by an ancestor who has no estate in possession, made void against his heir. This statute has been re-enacted in several of the States. It is the first in which the words "collateral warranty" are found, and has been generally considered as consigning most of the intricacies which attended it, to the research of the curious. Finally, upon the report of the Real Property Commissioners, warranties, with all real actions, have been entirely swept away.¹

The remedy on a warranty was by writ of *warrantia chartæ*, or by voucher to warranty. As a form of action merely, that of *warrantia chartæ* appears to have been as simple as the action of covenant, and the difficulties connected with it arise rather from the abstruse doctrines of warranty than from the organic principles of the action—difficulties which would occur in any other form of proceeding which would seek to enforce the rights acquired by warranties. A warrantee might implead his warrantor either before or after eviction. The action was frequently brought as a mere precautionary measure, as soon as there was the least reason to fear the loss of the land through a defect of title; and the judgment then obtained in the *warrantia chartæ*, which was called a judgment *pro loco et tempore*, bound all the lands of the warrantor from the day on which the writ issued, so that

¹ 3 & 4 Will. IV. c. 27, § 39; id. c. 74, § 14.

if the lands warranted were afterwards recovered from the warrantee, he in turn recovered the same value of land from the warrantor or his heirs. The effect of the judgment in this action is a cogent reason against the use of warranty in modern practice, since it would become necessary on the sale of lands bound by the *warrantia chartæ* to investigate also the title of those which had been conveyed with warranty.

The practice of voucher, on the other hand, tended to complication and delay. The warrantee called upon the warrantor or his heirs to come into court and defend the land, or yield him other lands of equal value. This requisition was termed a voucher to warranty. If the vouchee appeared, he was made defendant instead of him who had thus called upon him. If he failed to appear, or made default in any way after appearance, judgment was given against the warrantor, and at the same time judgment that the warrantee recover lands of equal value against him. But there were many writs and returns, false vouchers and continuances—voucher was only admissible in real actions, and not in all of those. From analogy to its practice have sprung many doctrines and obligations still subsisting, both in England and here, which, so far as they may relate to the subject matter under inquiry, will be particularly noticed hereafter.¹

The judgment both in a *warrantia chartæ* and in a voucher to warranty, seems to have been limited in its effect to the lands of equal value, which might still belong to the warrantor, or in case of his death have descended to his heirs. But in respect to estates less

¹ See Chapter VII.

than freehold, the warranty might be used as a personal covenant, upon which damages were recovered,¹ so that a warranty was a covenant real, when the freehold was brought in question, and operated as a personal covenant, where the loss sustained did not draw away the freehold.²

Of the effects of these real actions since the introduction of more modern forms, we may judge from the report of the British Commissioners in 1832, and the interesting evidence of the eminent practitioners which accompanies it. It is there said, "Before we ventured to recommend so important a measure as the entire abolition of real actions, we made diligent inquiries into the practical operation of this system of law, and from the result, we have every reason to think that it would have been beneficial to the community if real actions had been abolished from the time when the modern action of ejectment was devised. They have generally originated in schemes of unprincipled practitioners of the law to defraud persons in a low condition of life of their substance,

¹ As is shown by the case of *Pincombe v. Rudge*, Hobart's Rep. 3, where the defendant had granted a freehold with warranty, having previously demised the premises for a term of years. The lessee entered upon the grantees, who brought an action of covenant on the warranty, and demanded damages from the warrantor, who pleaded a *warrantia chartæ* brought against him by them, which was still undetermined. Upon demurrer, the question arose whether upon the claim of warranty annexed to a freehold, an action of covenant would lie, which was decided affirmatively, because although the warranty was annexed to the freehold, yet the breach was not of a freehold, but of a chattel, (viz., the lease for years, which had been the first estate created,) for which there could be neither a voucher, rebutter, nor *warrantia chartæ*.

² For the proceedings on a *warrantia chartæ*, reference may be had to Viner's Abridgt., title *Warrantia Chartæ*. Fitzherbert's Nat. Brev. 134; Booth on Real Actions, 242; *Roll v. Osborn*, Hobart 206; and for the writs and practice in voucher to warranty, Vin. Abridgt., Voucher; and note to 2 Saunders' Rep. 32.

under pretence of recovering for them large estates, to which they had no color of title. In many instances ruin has been the consequence to the demandants; and in all, much vexation and expense have been occasioned to the tenants, who, however groundless the claim may be, by a strange caprice of the law are not allowed any portion of the costs which they have incurred in defeating it, when brought forward in this peculiarly harassing form." The partial relief to the student from the mastery of so much learning, which, however technical, was yet indispensable to the comprehension of laws based upon it, seems to have confirmed this opinion, and the recommendation of the Commissioners met the sanction of Parliament. But a vital objection to the application of the doctrines of warranty to this country arises from our system of descents. Warranty descended only on the heir at common law—it operated as a rebutter on him alone—it bound him alone to render other lands of equal value. In those parts of England where the peculiar tenures of gavelkind and borough English prevailed, the inconvenience was extreme. The heir at common law was still vouched to warranty, though the inheritance was, in the one case divided among his brothers, and in the other enjoyed exclusively by the youngest of them.¹

The "covenants for title" were introduced, as a substitute for warranty, towards the close of the seventeenth century,² being, as is said in the preface to Sir

¹ Many instances of their occasional and separate use will be found in the older books, and be referred to hereafter, but it is believed that they were first employed, collectively and generally, as a substitute for warranty about this time.

² Brooke's *Abt. Garranties*, pl. 11.

Orlando Bridgman's *Precedents of Conveyances*, "advised by him during the time of his practice, when the unhappy circumstances in which the kingdom stood, afforded no other means of safety to persons of his loyalty and constancy, than a strict retirement from all public affairs."

These covenants were five—first, a covenant that the grantor was seized of the very estate which he purported to transfer, called the covenant for seizin; second, that he had a good and perfect right so to transfer it; third, that the grantor should quietly possess and enjoy the premises without interruption, called the covenant for quiet enjoyment; fourth, that such should be the case, free and clear from all incumbrances, leases, trusts, &c., called the covenant against incumbrances; and fifth, that such other deeds or instruments should be thereafter executed as might be necessary to perfect or confirm the title—this was called the covenant for further assurance. There was another covenant, which, though somewhat of a mixed character, and but seldom employed before and still more rarely after the introduction of those just named, was yet brought to this country by our ancestors, where it has taken deep root, and grown to be the covenant for title more employed and relied upon than any other. This is "the covenant of warranty."

The advantages which arise from the substitution of these covenants in place of warranties, are manifest from their pliant form, their greater certainty, and the effective nature of the remedy. Yet notwithstanding the improvements arising from the change, it was the opinion of a writer of reputation,¹ not thirty years

¹ Humphreys on Real Property.

ago, that there was still much to amend. Apart from the deficiencies shown by him to exist, a glance at modern English conveyances will show the justice of the complaint that more than half their tedious length is occupied with the covenants for title, elaborated with every addition which caution or profit to the draftsman could supply or suggest;¹ on the other hand, in America, though instances are not wanting of deeds embellished with every refinement of English conveyancing, yet the simplicity which characterized the early settlers, added to the fact of their emigration taking place soon after the introduction of these covenants, has, in general, caused the latter to be brief in the extreme. Partly, perhaps, as a consequence of this, it has been said more than once from the bench, that although covenants for title are found, in some shape or form, in almost every conveyance of real property in the United States, and are practically enforced every day, yet

¹ "Few conveyancing forms," it is said "can exceed them in the luxuriant growth to which their verbiage has attained." Williams on Real Property, 377. They usually occupy much more than half of an ordinary conveyance. The statute 8 & 9 Vict., c. 119, called "An act to facilitate the conveyance of real property," has endeavored to mitigate this evil by giving to short forms all the effect of the covenants as usually expressed at length. No provision is, however, made for thus supplying the covenant for seizin, owing doubtless to the reason that this covenant varies with the estate to be conveyed, which is not so much the case with those which follow it. A gentleman to whom I could safely refer, as to the practical operation of this statute, has in reply written, "So far as my experience goes, the 'pattern' covenants are not liked, and are but little used; our conveyancers find them suited to but very simple cases; and finding them insufficient in the majority of cases, mostly neglect them altogether. Probably our brethren in the country towns see more virtue in them than we do, and I believe they sometimes use them. I will not do the profession the injustice to suppose that they are opposed to useful reforms and curtailments in forms, merely from mercenary motives, as I know the contrary to be very much the case. At the same time, if some mode could be hit on for remunerating head work irrespective of length, it would be well, and would tend to the introduction of greater brevity."

that their effect, and the rules which govern them, are less reduced to order, and less understood as a system, than almost any other similar branch of learning. Yet, with all this, it will be found that far less practical contradiction exists than would have been supposed. The cases admit of distinct, and, in general, harmonious classification; and it is hoped that this attempt at their arrangement will show, that although lines of difference will occasionally be found somewhat strongly marked, yet that the law is not less satisfactory in this branch, than in many others of equal importance.¹

It is proposed in the following pages to consider the covenants for seizin, for right to convey, against incumbrances, for quiet enjoyment, for further assurance, and of warranty, in detail and separately, examining in each its form, definition, scope, and the measure of damages consequent upon its breach. The chapter on the latter covenant will include, in addition, an inquiry into its origin and introduction here, and a consideration of the doctrine of eviction, together with whatever peculiarities have marked it in this country. Then will be considered the extent to which covenants for title run with the land—the operation of these covenants by way of estoppel or rebutter—the doctrine of implied covenants, and

¹ These remarks are so elementary that authorities have not been produced in support of every part of them. Those which have been chiefly relied on are Co. Litt. 365 to 394, and the very satisfactory notes of Mr. Charles Butler; Mr. Preston's edition of Shephard's Touchstone (Law Lib. vol. 30 and 31); Viner's Abridgment, Title "Voucher," and the authorities there referred to. Great profit may also be derived from the elaborate notes to Spencer's case, and the Duchess of Kingston's case, in the American edition of Smith's Leading Cases—the Third Report of the English Real Property Commissioners, and the Report of the Pennsylvania Commissioners in 1835.

how far covenants for title, whether expressed or implied, may be limited or qualified—the covenants which a purchaser has a right to expect, and which a vendor is obliged to give—the rights and liabilities of the covenantor and covenantee, the heir, the devisee, the executor or administrator, and the assignee—and lastly, the right of the purchaser at law and in equity to detain or recover back the purchase money by reason of an incumbrance or defect of title.

CHAPTER II.

THE COVENANT FOR SEIZIN.

TITLE, from an early day, was defined to be the just means, whereby the owner of lands has the possession of his property,¹ and in order that it should be legally complete, there was required *juris et seisinæ conjunctio*.² This seizin denoted the completion of that investiture by which the tenant was admitted into the tenure—without it, no freehold could be constituted or pass.³ The delivery of possession, the livery of seizin, was the essential part of a feudal transfer, and the deed which accompanied it, the mere authentication of the transaction. In this sense, seizin was synonymous with possession, and was usually called seizin in deed, or actual seizin. But the term sometimes imported more than mere actual possession. There was a virtual or constructive seizin, such as arose through the possession of a tenant for years, which was deemed to be the possession of the owner of the freehold. There was also a seisin in law, as when after a descent, the heir who had the right of possession, though he had not actually entered, was deemed, for some purposes at least, seized of the free-

¹ Co. Litt. 344 b; 2 Bl. 195.

² It was also called *jus duplicatum* or *droit droit*. Co. Litt. 266 a; Butler's note 266 b.

³ 1 Burrow, 107. To this there was one exception, in the case of a fine, which was a judicial acknowledgment, in a feigned action, by the person in possession that the right was in another.

hold, while the possession was vacant, and until it was occupied by another.¹

Warranty, in that day the covenant for title which accompanied the common law modes of assurance, was a singular mixture of the covenants which have superseded it. It was intended to assure the title in its strict definition, that is, the union of the right and the possession. Although the latter might not be actually disturbed, yet he who had received the warranty could, by means of a *warrantia chartæ quia timet*, obtain a present lien upon the other lands of his warrantor, if the right of the latter were defective. When the possession was disturbed, execution could issue upon this judgment. It was therefore intended to protect both the *jus* and the *seisina*. The inconvenience and notoriety attending these common law assurances were, to a great degree, dis-

¹ At this lapse of time, few subjects require to be handled with greater delicacy than those of seizin and disseizin—the latter, which bears the reputation of being “one of the most obscure and difficult in the law,” (1 Cruise 14,) has caused much difference of opinion as to its essence and operation between the most distinguished authorities. It is sufficient here to notice that in the well known case of *Taylor v. Horde*, 1 Burr. 60, the principles of the common law were ably shown by Mr. Knowler to be, that a wrongful possession by a stranger, and feoffment by him, passed to the feoffee an actual immediate estate of freehold with all its rights and incidents, defeasible only by the lawful owner, whose right of entry, however, was taken away by a descent cast on the heir of the feoffee. Lord Mansfield, however, held that mere acts of intrusion or trespass followed by a feoffment, could not thus turn the lawful owner into a disseizee, unless he should elect to consider himself disseized, and this doctrine has been since generally adopted in the English cases. *Jerrit v. Weare*, 3 Price, 575; *Goodright v. Forester*, 1 Taunt. 578; *Doe v. Lynes*, 3 Barn. and Cress. 388; notwithstanding the earnest stand made against it by Mr. Preston and Mr. Butler; *Preston on Abstracts*, 279. Mr. Butler’s note to Co. Litt. 330 b. is eminently clear and able—far more so than the remarks of Mr. Preston. In America, the cases which are collected in the Digests, under the head of “Seizin and Disseizin,” have reference almost exclusively to what constitutes an adverse possession under the limitation acts. See Mr. Wallace’s note to *Taylor v. Horde*, 2 Smith’s Leading Cases, 468, Amer. ed.

pensed with in those which succeeded them, and which derived their efficacy by virtue of the Statute of Uses. During the century and a half which elapsed between this period and that of the Restoration, the whole system of conveyancing was in a state of transition. Among other changes, the reports of Coke, Croke, Hobart, and others of that period, show us that the warranty was comparatively disused, and in its place inserted personal covenants, inartificially framed, but which formed the skeleton of those which in the latter part of the seventeenth century came into general use. The word *seizin* seems gradually, during this time, to have been looked upon less as one of the parts of a title, than as synonymous with title itself, and the covenant that one was seized in fee, was regarded as a covenant for the *title*, in contradistinction to the covenant for quiet enjoyment, which was called a covenant for the *possession*,¹ and such has been the case in England down to the present day.² The covenant is, therefore, in this respect, synonymous with that which usually follows it, viz., that the grantor has good right to convey.³

The covenant for *seizin*, which almost invariably

¹ Cooke's Case, 1 Keb. 95; 1 Lev. 46; Gregory v. Mayo, 3 Keb. 755.

² Howell v. Richards, 11 East, 641; Young v. Raincock, 7 Com. Bench, 310.

³ Browning v. Wright, 2 Bos. & Pull. 14.

They are, however, far from being synonymous covenants in all respects; as although a covenant for *seizin*, as expressed above, implies a right to convey, yet the converse of this will by no means hold, 3 Lev. 45, the instances being numerous, in which one has a good right to convey, though not seized of a legal estate. In such cases the covenant for *seizin* is improper, and should be omitted, and in its place substituted such as the nature of the case requires, as, in a conveyance under a power, that the power still subsists and has not been exercised or revoked, etc. 4 Cruise 78., 2 Sug. on Vend. 510, Dart on Vend. 259.

has the first place in the series of covenants for title, is, when applied to the conveyance of a fee simple estate in England, at the present day, generally introduced in the following form:

“And the said (grantor) doth hereby for himself, his heirs, executors and administrators, covenant, promise, and agree to and with the said (grantee) his heirs and assigns, in manner following, that is to say, that he the said (grantor) is now seized to him and his heirs of a good, sure, sole, lawful, absolute and indefeasible estate of inheritance in fee simple, of and in the said messuage, &c., hereby released,¹ or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances, without any condition, trust, power of revocation, or of limitation to use or uses, or any other power, restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, abridge, lessen, incumber, or determine the same estate, or any part or parcel thereof.”²

As thus expressed, the covenant is what is termed,

¹ The words “bargained and sold” would, it is presumed, be generally inserted instead of “released,” in American conveyances, in which this covenant was expressed at length. Is it familiar, that in England a lease and release has been the mode of assurance generally adopted in modern conveyancing, and had an advantage over a bargain and sale, in that it did not require enrolment under the statute 27 Henry VIII. c. 16, and is besides better capable of sustaining limitations of uses. The objections against notoriety which there prevail, are in this country rendered idle by our recording acts, and a bargain and sale possesses the advantage of greater simplicity both in theory and practice.

² This is a form of the covenant when used in the conveyance of a fee simple estate. It will of course be modified according to the different estate intended to be conveyed. The form in the text has been taken from Platt on Covenants, 135, and seems by comparison with others to be that generally used at the present day. Forms will also be found in the fourth volume of Wood’s Conveyancing, pp. 5, 6, 7, etc.

a general, unlimited, or absolute one; that is, a covenant for the seizin of the grantor, without regard to the prior acts of any persons whomsoever. When, however, a party is only willing to covenant against defeasibility of the estate, by reason of his own acts, the covenant, which is then termed a special, limited, or qualified one, is introduced by the words, "That notwithstanding any act, deed, matter or thing, by the said (grantor) done, executed, committed, or knowingly permitted, or suffered to the contrary, he, the said (grantor) is now seized," &c.

This covenant has been defined to be "an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey,"¹ and owing to the precision of language in which it is thus expressed, no case can be found in England in which less than an exact compliance with this definition has been held sufficient to prevent its breach.

But it has been before remarked, that the form in which the covenants for title are expressed, constitutes one of the most marked distinctions between conveyances in this country and in England. For this, satisfactory reasons may perhaps be given. The earlier settlers of America left the mother country after the ancient warranty had fallen into disuse, and before the covenants for title had assumed a regular form. In the earlier conveyances these covenants, if used at all, were expressed with the same brevity which characterized them at their first introduction in England. Gradually they became here, in some parts of the country at least, more full and precise,

¹ Howell v. Richards, 11 East, 641, per Lord Ellenborough.

until, at the time of the Revolution, or soon after, they relapsed into their former terseness. In addition to this, the labor of the English draftsman was, as now, to a great extent, paid by the length of the instrument, an evil which seems to have had no place in our country.

However general, therefore, in England, may be the expression of the covenant for seizin by the preceding form, in this country it is usually couched in the briefest terms; the words, "that he, the said (grantor) is lawfully seized," or "has a good and sufficient seizin," being not unfrequently the only ones employed.¹

At the time when these covenants were originally introduced, owing to the sense in which the word seizin was used, as synonymous with title, it would seem that a covenant expressed in this short form had the same practical import as the longer form which succeeded it, and a covenant that one was seized, or lawfully seized, meant seized of an indefeasible estate.² But such has not been the construction in many parts of this country, where it has been held that a covenant "that the grantor is lawfully seized," or "has a good and sufficient seizin," does not exact an indefeasible estate, but is answered by the

¹ In this country there are many States in which the covenants for title, or some of them, are, by statute, implied from the granting words of the conveyance, at least so as to assure the estate to the purchaser, so far as the acts of the vendor are concerned, see Chapter X.; and where such is the case, the covenant for seizin, being usually one of those thus implied, is often entirely omitted in express words, and the only covenant expressed is that of warranty. Even where no such statutory provisions are in force, the latter is not unfrequently the only covenant which the conveyance contains; but throughout New England, and in several of the other States, the covenant for seizin forms one of what are termed "the usual covenants."

² Cooke's case, 1 Keb. 95; 1 Lev. 40; Touchst. 170.

transfer to the purchaser of an actual seizin, no matter how tortious, provided it be a seizin under color of title.

This doctrine seems first to have been promulgated in the year 1807, by Chief Justice Parsons, in the case of *Marston v. Hobbs*,¹ where, in an action on a covenant that the grantor was "lawfully seized in fee of the premises," that learned judge held the following language: "The defendant, to maintain the issues on his part, was obliged to prove his seizin when the deed was executed. But it was not necessary to show a seizin under an indefeasible title. A seizin in fact was sufficient, whether he gained it by his own disseizin, or whether he was in under a disseizor. If at the time he executed the deed he had the exclusive possession of the premises, claiming the same in fee simple by a title adverse to the owner, he was seized in fee, and had a right to convey. If Weare Drake had no authority to convey the premises to the defendant, yet if, in fact, he entered under color, though not by virtue of that deed, and acquired a seizin by disseizin, by ousting the former owner, he has not broken these covenants."

The same principle was soon after applied under a precisely similar covenant in the subsequent case of *Bearce v. Jackson*,² and the construction thus given to the covenant for seizin, "as usually expressed," or "in its usual form," has been recognized and adopted, not only in Massachusetts, but in some of the other States.³ In none of these cases is the precise

¹ 2 Mass. 439.

² 4 Mass. 408.

³ *Chapel v. Bull*, 17 Mass. 213; *Wait v. Maxwell*, 5 Pick. 217; *Breck v. Young*, 11 New Hamp. 489; *Kirkendale v. Mitchell*, 3 McLean, 145; *Cushman v. Blanchard*, 2 Greenl. 268; *Griffin v. Fairbrother*, 1 Fairf. 95;

form of the covenant given—the doctrine is applied to the covenant “as usually expressed in our deeds.”¹

Wheeler v. Hatch, 3 id. 388; *Boothby v. Hathaway*, 20 Maine, 255; *Baxter v. Bradbury*, id. 260; *Backus' Admrs. v. McCoy*, Ohio, 211.

The case of *Backus' Admrs. v. McCoy*, though differing in some respects from these cases, yet states with clearness the doctrines on which they proceeded. After referring to the decision in *Marston v. Hobbs*, Sherman, J., held the following language: “This decision appears to us to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseizin, his covenant of seizin is not broken, [until the purchaser, or those claiming under him, are evicted, by title paramount]. He has a seizin in deed, as contradistinguished from a seizin in law, sufficient to protect him from liability, under his covenant, [as long as those claiming under him may continue so seized]. Actual disseizin, or the actual adverse possession of the lands of another is the commencement of a right, which, by lapse of time, may ripen into a perfect title, in the disseizor or possessor; and during the time that the grantee of such disseizor remains in the undisturbed possession of the lands, by reason of the conveyance of such disseizor, he cannot maintain an action upon the covenant of seizin. No breach of such covenant will have taken place, if the grantor was seized in deed at the time of the conveyance, however that seizin may have been acquired. If the grantor, at the time of executing this conveyance, was in possession of the land, either as disseizor, or under color of title, it cannot be said, that he was not seized of an estate in the premises.” These principles were affirmed in *Foote v. Burnet*, 10 Ohio, 327, and *Devore v. Sunderland*, 17 id.

The parts in this quotation marked within brackets, draw a distinction which is not recognized by the cases referred to in the text. *Marston v. Hobbs*, and the cases which follow it, decide, that if there is an actual seizin, the covenant is not broken *at all*. There has been and can be no breach, and the covenant will have been fully answered even though the purchaser should afterwards be evicted. But this case of *Backus v. McCoy* decides that where there is an actual seizin, the covenant is not broken *at that time*; it remains unbroken so long as the grantee, or those claiming under him, continue seized, and the breach is postponed until their seizin be disturbed, either actually or constructively. This course of reasoning is intended to give to the heir, the devisee, or the assignee of the covenantee a right of action in his own name where the actual seizin has been transferred to him—a result to which the cases above cited refuse their concurrence, as they hold that the covenant for seizin is broken, if at all, the instant it is made, becoming thereby a right of action and incapable of transmission by descent or assignment. See Chapter VIII.

¹ These cases must be distinguished from that class to which belong *Beddoes' Exrs. v. Wadsworth*, 21 Wend. 120; *Fowler v. Polling*, 2 Barb.

Where, however, it is expressed by the words, "seized of an *indefeasible* estate," it receives the same construction every where.¹

There is one point of view from which the construction thus given to this covenant might readily appear to be correct. Since possession enduring for a sufficient length of time, will, under the limitation acts, ripen into a good title, there seems reason for holding that such possession should be regarded as an actual estate from the moment of its commencement, and therefore that the "seizin," which this covenant purports to assure, might properly be used in its old signification, and not, as has been more recently the case, as synonymous with title.

But some of the same cases, which decide that a possession under color of title is sufficient to support a covenant for seizin, as expressed above, take no distinction between such a covenant and one that the grantor has good right to convey. Independently of

S. C. R. 300; Slater *v.* Rawson, 6 Metcalf, etc.; which decide that a seizin in fact is a sufficient estate to carry with it to an assignee the covenants for quiet enjoyment and of warranty. See Chapter VIII. They do not, however, hold that such a seizin will support a covenant for seizin.

¹ This has been noticed by Chief Justice Parsons in Prescott *v.* Truman, 4 Mass. 627, and by the cases of Garfield *v.* Williams, 2 Vermont, 328; Pierce *v.* Johnson, 4 id. 353; Abbott *v.* Allen, 14 Johns. 248; Collier *v.* Gamble, 10 Missouri, 472.

Professor Dane, in his Abridgment, draws the distinction somewhat further than the authorities support. "If," says he, "the grantor covenant he is seized in fee, and the issue be thereon, and he proves seizin in fact even by disseizin, he maintains the issue; but if he covenant he 'is lawfully seized in fee,' and issue be thereon, it is essential, to maintain the issue, he prove he was lawfully seized; and if seized only by disseizin and wrong, the jury cannot, on this issue, find he was lawfully seized." Vol. 4, p. 339. The cases, however, do not draw the distinction between "seized" and "lawfully seized." In most of those cited in the text the covenant was that the grantor was lawfully seized. The two expressions are treated as synonymous. But the distinction is taken between these expressions, and "*indefeasibly* seized."

the statutes of champerty, the latter covenant has no connection whatever with the possession—it refers, as its language indicates, merely to the right. This distinction, however, some cases seem not to have observed. Thus, in *Twambley v. Henley*,¹ it was held by Parsons, Ch. J., that one who, claiming to be seized, had covenanted that he had “full power, good right, and lawful authority to sell,” was a competent witness for his grantee, in an action against him under the paramount title, “as there was no covenant that the grantee should have a good title.” So in a subsequent case,² the same learned Judge observed, “The covenant for seizin is not broken, for it admitted that the grantor was seized; neither is the covenant of a right to convey broken, for a man seized has a right to convey. . . . In English deeds there is sometimes inserted ‘a covenant that the grantor has good right to convey an *indefeasible estate* in fee simple. . . . This covenant is not usually, if ever, introduced into our deeds of conveyance.” So in a recent case,³ where the covenants were of good right to sell, and of warranty, it was said by Dewey, J., that “the covenants of seizin and of right to convey, are, to all practical purposes, synonymous covenants, the same fact, viz., the seizin in fact of the grantor claiming the right to the premises will authorize both covenants, and the want of it is a breach of both.” Again, where⁴ the defendant had covenanted that he was the lawful owner of the land, and was seized and possessed thereof in his own right in fee simple, and had full power and

¹ 4 Mass. 441.

² *Prescott v. Truman*, id. 631.

³ *Slater v. Rawson*, 1 Met. 450, 456.

⁴ *Willard v. Twitchell*, New Hamp. 178.

lawful authority to grant and convey the same, it was observed, that "each of these amounts only to a stipulation that the grantor has such a seizin that the land will pass by his deed."¹

But the doctrine of actual seizin, as applied in some of our States, has not met with approbation in others. In the case of *Catlin v. Hurlburt*,² *Hutchinson*, Ch. J., held the following language: "The present covenant declared upon is, that the grantors were well seized of the same land in fee simple, and had in themselves good right to bargain and sell the same, in the manner in said deed mentioned. These expressions, and those of similar import, have always been considered, in this State, as amounting to a covenant of title. They have been inserted, that they should be so considered. It is argued, however, that this means nothing more than that the grantors were in possession, claiming to hold in fee simple.

This alteration might as well be incorporated, by construction, into all the covenants, that decidedly relate to title, in the whole deed. That they were well seized in fee simple, means, that they were actually in possession, claiming to hold in fee simple. That they had good right to sell and convey, means, that they claim to have such right. That the premises are free from all incumbrances, means, that they claim that they are thus free. This is not the most natural and obvious meaning of the usual expressions in deeds of warranty. They say nothing about claiming. They speak of realities. Fee simple denotes a permanent estate. Well seized in fee simple, denotes a seizin of a permanent estate. Such would be the most natural construction, without the

¹ See *infra*, p. 45, for an explanation of these cases.

² 3 Vermont, 407.

aid of concurrent circumstances. But when we recollect that this deed was made and executed at a time and place, when and where such expressions were universally understood to relate to title, it would do injustice, should we give to them a different construction."

The earlier Massachusetts decisions were also commented on with great severity in Connecticut, by Hosmer, Ch. J., in *Lockwood v. Sturdevant*,¹ whose remarks were quoted with approbation, in *Richardson v. Dorr*,² "and these latter decisions contain,

¹ 6 Conn. 385.

"Although my judgment," said Hosmer, Ch. J., "might safely be rested on the inapplicability of the decisions cited, (*Marston v. Hobbs, &c.*) I am constrained to observe, that notwithstanding the veneration I entertain for the highly accomplished jurist, who expressed the above opinions, I cannot yield to them my assent. That which shows covenants of seizin and of right to convey, to be broken, is their falsity. If the covenants are true, they remain inviolate; if they are not true, they are broken. On the same principle, if they are entirely false, they are wholly violated; and if partially untrue, they are broken, but in part only. All this is self-evident. Although the covenantor should have had the actual possession of the premises, and an ideal or imaginary right, founded on a supposed title that was merely colorable, *yet this is not a legal seizin in fee*; and nothing short of this will support a covenant that the grantor is seized in fee simple; because nothing short of this proves the covenant to have been true. This construction necessarily results from the unequivocal words of the covenantor, and the unquestionable object of the covenant. That was security to the purchaser, to the extent of the title purporting to have been conveyed. The determinations on which I am expressing an opinion, are opposed to the plain intendment of the most unambiguous expressions; to the object of the parties in making the covenants in question; and to their utility, by reducing them to little more than a nugatory agreement. A seizin in fact of an estate in fee simple, if the word seizin intends anything more than possession, is an expression without meaning, where there is no seizin in law. In the nature of things, there is but one species of seizin in fee, and that necessarily is the possession of an estate conveyed with such a legal interest as the term fee simple denotes." The covenant, however, in this case was for an *indefeasible* estate—an expression which admits of but one construction. The case therefore did not strictly call for the above remarks, as is indeed stated in the commencement of them.

² 5 Verm. 921.

it is apprehended," said Chancellor Kent, "the true rule of the common law."¹

The origin of this doctrine of actual seizin seems enveloped in some doubt. "The rule seems in some measure," says the late able reporter in Ohio,² "to have grown out of the hardship, real or apparent, of permitting a grantee to recover back the consideration money and interest, while he or his assignee³ is enjoying a possession, that by lapse of time may ripen into a perfect title." But under such circumstances it is well settled that the grantee is *not* entitled, as a matter of course, to recover back the consideration money. For although the weight of American authority has determined that the covenant for seizin is broken, if at all, as soon as it is made, and thereby an immediate right of action accrues to him who has received it,³ yet so far as the damages are concerned, they are measured by the actual loss at that time sustained, and not abstractly by the amount of the consideration money. If the purchaser has bought in the adverse right, his damages are measured by the amount he has paid. If he has been actually deprived of the enjoyment of the whole subject of his purchase, or of a part of it, they are then measured by the whole consideration money in the one case, and a corresponding portion of it in the other.⁴

If the doctrine of actual seizin has had its rise from the reason here suggested, the Courts have been forced to go farther than was called for by such exigencies. For if the covenant be fully answered by the transfer of an actual, though a tortious seizin,

¹ 4 Comm. 472.

² Wilcox's note to Foote v. Burnet, 10 Ohio, 327.

³ See Chapter VIII.

⁴ See the cases as to damages in the subsequent part of this chapter.

the subsequent disturbance of the purchaser can give him no rights under that covenant, as its purpose was accomplished by the transfer of the actual seizin. Nor is this a mere individual inference, for in *Cushman v. Blanchard*,¹ Mellen, Ch. J., remarks, "If the grantor was seized in fact, though not of an indefeasible estate, and the grantee enters under his deed, then the covenant of seizin is not broken; but the grantee may be evicted by elder and better title, and then the covenant to warrant and defend is broken, *and no other.*"

But there may be another reason more probable than this. It has already been said that the doctrine of actual seizin could be accounted for satisfactorily, on the ground of seizin being used as synonymous with possession,² were it not that the same construction has, in some cases, been applied to the covenant for good right to convey, which would appear to have no connection with the *possession* but to be confined exclusively to the *right*, and the reason referred to would, therefore, be wholly inapplicable to such a covenant.

The foundation of the doctrine of actual seizin must therefore be sought from another quarter, and it seems not improbable that it has sprung from the doctrine of adverse possession, as connected with the champerty acts. Such was the suggestion of Hutchinson, Ch. J., in the case of *Catlin v. Hurlburt*, already cited.³ "It is probable," said he, "the

¹ 2 Greenleaf, 268.

² And such was the decision in *Wilson v. Forbes*, 2 Dev. 30; *Thomas v. Perry*, 1 Peters C. C. R. 49; and *Wheeler v. Hatch*, 3 Fairf. 388, where it was held that the covenant applied equally to the *right* and to the *possession*, and was broken if the latter were wanting, no matter how good soever the former might be. See *Triplett v. Gill*, 7 J. J. Marshall, 436.

³ 3 Verm. 407.

covenant for seizin was anciently introduced into deeds, to guard against such an adverse possession as would render the deed void; as would have been the case at common law, and is now the case by virtue of our statute, if there be an adverse possession."¹

The history of the enactments referred to, and its connection with this subject, deserve some consideration. It is familiar, and has been already stated, that the delivery of possession was the essential part of a feudal transfer. But very soon after the enactment of the statute of uses, it was most ingeniously made the medium of transfers of land without the delivery of possession. With the view to counteract this, as much as possible, while at the same time preserving the statute itself, it seems to have been the aim of the legislature to exact still some notoriety in the transaction, and perhaps with this end the Statute of Enrolments,² was passed. Soon after came the statute, 32 Hen. VIII., c. 9, called "the bill of bracerie or buying of titles," since more commonly known as the "pretended title Act," which seems further to evince the design of the legislature to preserve the transfer of the possession as an ingredient of title. This Act prohibited the bargain, sale, or transfer, of any premises of which the party had not been in possession, or received the rents or profits, for a year previously, under the penalty, (imposed both upon the seller and the purchaser, if he purchased knowingly,) of the forfeiture of the value of the premises. "This statute," said

¹ So in *Triplet v. Gill*, 7 J. J. Marshall, 436; it was said, "Grayson, without being seized in fact, or in law, may, according to the law in force at the date of the deed, have had lawful right and authority to convey a legal title. The champerty act of 1824 did not take effect until July of that year."

² 27 Hen. VIII. c. 16.

Montague, Ch. J.,¹ "has not altered the common law, for the common law before the statute, was, that he who was out of possession, ought not to bargain, grant, or let his title, and if he had done so, it would have been void; then the statute was made in affirmation of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was void by the common law before."

This passage, to be properly understood, must be taken as having reference to the mode of conveying introduced by the statute of uses. The common law had indeed, long before then, declared that the transfer of a right of entry or a right of action was void, "lest there should be maintenance and stirring up of suits,"¹ and the same principle was applied, as part of the common law, to the transfer, through the medium of the statute of uses, of real estate of which the possession was not transferred with the right. But before that statute there could scarcely be such a thing as a transfer of land held at that time in adverse possession. "Where land was conveyed by feoffment, the only mode known to the earlier law, the difficulty with regard to possession could not arise, for in order that the livery of seizin should be effectual, it was necessary in general for the feoffor to have actual possession at the time of livery made. For this purpose a claim by him, and his presence upon the land, if without present right to possess it, were not sufficient, but it was requisite that the party previously possessed, and all persons holding for him, should either be expelled from every part of the premises, or that

¹ Partridge v. Strange, Plowden, 88.

² Co. Litt. 214 a.

he should virtually surrender possession by giving his consent to the feoffment."¹

When, however, the mode of assurance was altered, and the land could be transferred without a notorious change of possession, the application of the remarks of Ch. J. Montague becomes obvious. Whatever may have been the intention of the legislature in passing the statute of 32 Hen. VIII., it is certain that it was judicially looked upon as scarcely altering the law as it stood at that time, and that "the offence of maintenance consisted not so much in taking a conveyance of the whole or part of a thing not vested in the party by whom it was made, as in taking it in consideration of assisting or maintaining a suit for its recovery,"² and such has been the course of decision in England down to the present day;³ and it is there well settled that where the transfer is not made for the purpose of assisting or maintaining a suit, the mere fact of an adverse possession will not invalidate the conveyance.⁴

In most parts of this country, however, the doctrine receives a wider application. In some of the States, the statute of 32 Hen. VIII. has been re-enacted literally, in some it has been modified,⁵ in others the prohibition of champerty is regarded as part of the

¹ Note to *Duchess of Kingston's case*, 2 Smith's Leading Cases 515, Amer. ed.

² Note to *Duchess of Kingston's case*, supra.

³ *Stanley v. Jones*, 7 Bing. 369; *Doe v. Evans*, 1 Com. Bench, 717; *Hitchens v. Lander*, Cooper, 34; *Sharp v. Carter*, 3 P. Wms. 375; *Prosser v. Edmonds*, 1 Young & Col. 481; *Harrington v. Long*, 2 Myl. & Keen, 590; *Anson v. Lee*, 4 Simons, 364; *Hunter v. Daniel*, 4 Hare, 420; *Wilson v. Short*, 6 Hare, 366.

⁴ *Doe v. Martyn*, 8 Barn. & Cress. 497.

⁵ See 4 Kent's Com. 446.

common law of the State,¹ while in a few it has no existence whatever.² In those States, however, in which, whether by statute or common law, the offence of champerty is prohibited, the effect of such prohibition seems to be that a conveyance by a party out of possession, and with an adverse possession against him, is void as against the party in possession—in other words, as respects the latter, the grantor has passed no right whatever to his grantee. The mere fact, therefore, of the transfer of real estate of which there is an adverse possession is deemed of itself an offence within the spirit of the champerty acts. This then is the clue to the remark cited above from the case of *Catlin v. Hurlburt*, viz., that the covenant for seizin was originally introduced to guard against such an adverse possession as would, under the champerty acts, render the deed void, or rather to indemnify the purchaser in case of an adverse possession. In *Clark v. McAnulty*,³ Gibson, Ch. J., remarked: “It is urged that the statute of 32 Hen. VIII. c. 9, is not in force here, and as it is usual to sell land where the vendor is not in possession, a larger operation should be given to the covenant of warranty here than elsewhere, because the vendee, where he did not obtain actual possession, would otherwise be without remedy. This is a good reason why a purchaser should secure himself by a covenant of seizin, or that the vendor has a lawful right to convey, but it is no

¹ *Brinley v. Whiting*, 5 Pick. 355. *Dexter v. Nelson*, 6 Alab. 69. *Fite v. Doe*, 1 Blackf. 127. *Bowman v. Burnley*, 2 McLean, 376.

² These are Pennsylvania, (*Stoever v. Witman*, 6 Binney, 420. *Cresson v. Miller*, 2 Watts, 272.) New Hampshire, (*Willard v. Twitchell*, 1 N. H. 178. *Maddock v. Wilmarth*, 5 N. H. 181.) Delaware, (*Bayard v. McLean*, 3 Harr. 139,) and, it is believed, Illinois, Missouri, and Louisiana.

³ *Serg. & Rawle*, 372.

reason why the law should interfere to cure the effects of negligence at the expense of confounding settled distinctions."

It would seem, therefore, to have been the intention of the courts in which the doctrine of actual seizin prevails to consider the covenants for seizin, and of good right to convey, as assurances to the purchaser that there was no such adverse possession of the subject of the purchase as would bring him within the penalties of champerty, and to furnish him with a recompense if such should be the case. If, therefore, an actual seizin were transferred to the purchaser, the vendor had a right to convey, within the spirit of the champerty acts, and the covenants for seizin and of good right to convey were fully answered. Such at least would appear to be the more philosophical reason for the construction which has been given to these covenants.

A question, however, arises in this connection as to the effect of the champerty acts on the covenants for title contained in the conveyance. It would seem that when the purchaser buys with knowledge of the state of the title, courts will not lend their aid to enforce the covenants that he receives; for as was said in a recent case in Tennessee,¹ "It was ever the purchaser's restless cupidity, stimulated by the low price of those dormant claims and by the prospect of large profit, which attacked the quiet and repose of society; and to give such a construction to the statute as would permit the buyer of dormant claims securely to take a deed or covenant from the claimant, and then indemnify himself by a suit

¹ Williams v. Hogan, Meigs' R. 189.

against his vendor upon the deed or covenant, would be to encourage and not to suppress the spirit of champerty." The cases of *Mitchell v. Smith*,¹ *Belden v. Pitkins*,² *Whittaker v. Cone*,³ and *Woodworth v. Dole and Jones*,⁴ may be here referred to as illustrative of this question. Those cases arose under peculiar circumstances. Some time after the settlement of Pennsylvania, many difficulties sprung from conflicting claims to lands in the northern part of that State, derived on the one hand from the proprietaries or the Commonwealth, and on the other from the "Susquehanna Company," under the title of Connecticut, and after years of contest and even some bloodshed, Congress interfered, and commissioners or judges, appointed by its authority, decided the right of government to be in Pennsylvania, leaving however the question of particular titles untouched. Many of the old settlers under the Connecticut title still remained, and numbers of new settlers under this title intruded themselves, and after repeated Acts to remedy the mischief, the Legislature of Pennsylvania passed the Act of 11th of April, 1795,⁵ the first section of which imposed a penalty upon any one who should intrude or settle within certain counties named, under any "half share right or pretended title not derived from the authority of this Commonwealth," and the second section made it also penal for any person to combine or conspire for the purpose of conveying or settling any such lands.

In *Woodworth v. Jones*, the purchaser of a Connecticut title filed a bill to compel repayment of that part of the purchase money which had been paid,

¹ 1 Binn. 110. ² 2 Caines, 149. ³ 2 Johnson's Cases, 58. ⁴ Id. 417.

⁵ 3 Smith's Laws, 209, and see note in that volume.

which was dismissed by the Court on the ground that as there was evidence that the purchaser bought *with knowledge of the state of the title*, equity could not lend its aid either to enforce or rescind such a contract, but would leave the parties to their remedies, if any, at law; and in the subsequent case of *Whittaker v. Cone*, where the plaintiff sued at law upon promissory notes given for the purchase money of such a title, the Court refused to sanction a recovery, and the plaintiff was non-suited. The case of *Mitchell v. Smith* was similarly decided, as also that of *Breckenridge v. Moore*.¹

These cases appear to be founded on sound principle. Although it is not too much to say that the hardest cases to be found in the books have arisen from defendants sheltering themselves from responsibility on such grounds, yet, as Lord Mansfield has ably remarked,² "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own

¹ 3 B. Monroe, 629. So in the cases of *Holman v. Johnson*, Cowper, 341; *Briggs v. Lawrence*, 3 Term R. 434; and *Clugan v. Peneluna*, 4 id. 466, the knowledge of the plaintiffs that they were engaged in an unlawful traffic was relied on by the Court, as the ground of the decision against them.

² Cowper, 343.

stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, "*potior est conditio defendentis*."

But when the conduct of the purchaser has not been such as to bring himself within the spirit of the champerty acts, while their letter renders the transfer void as against the party in possession, yet it would seem that as between the parties themselves it is valid,¹ and will operate not merely by way of estoppel to the grantor,² but the covenants in the deed can be made available to the grantee.³ "The statute," said Lord Hobart, speaking in general terms, "is like a tyrant, where he comes, he makes all void, but the common law is like a nursing father, and makes void only that part where the fault is and preserves the rest."⁴ Thus the statute 5 Ed. VI. c. 16, made absolutely void the buying and selling of

¹ Br. Ab. Feoffment, pl. 19; Co. Litt. 369; Cro. Eliz. 445.

² As was held to be the case under any circumstances in *Jackson v. Demore*, 9 Johns, 55; *Livingston v. Penn. Iron Co.* 9 Wend. 516; *Simpson v. Prosens*, 2 Hill, 528.

³ Such must necessarily have been the ground of the decision in *Van Hoesen v. Benham*, 15 Wend. 165, where the grantor was admitted as a witness for the grantee, *on the release of the covenants for title*.

⁴ See *Waters v. The Dean and Chapter of Norwich*, 2 Brownlow, 158. This case is distinguishable from *Soprani v. Skuno*, Yelverton, 19, and *Capenhurst v. Capenhurst*, T. Raym. 27, where in the one case the lease was void from not being signed, and in the other void from uncertainty.

certain offices; and where¹ the condition of a bond was for the performance of covenants in an indenture whose subject was such a purchase, it was held that the bond was void in all its parts. On the other hand, where similar statutes have admitted of such a construction as to enable the independent covenants to be enforced, courts have not hesitated to adopt it.²

In the case of *Phelps v. Decker*,³ the defendant, a resident of Pennsylvania, was sued in Massachusetts on his covenants for title, contained in a deed executed in New York, and purporting to convey land granted by this Susquehanna Company, under the Connecticut title. The deed conveyed the premises, "in his actual possession being," and they were, in the description, "warranted from all claims and demands whatsoever, so far as the Connecticut Susquehanna Company's purchase extends, and is regularly made"—there were also unlimited covenants for seizin, of right to convey, quiet enjoyment and warranty. The breach was assigned by negating the words of the two first of these covenants. The defendant pleaded that all the estate of the Susquehanna Company was regularly vested in him, and by him transferred to the plaintiff. To this there was a demurrer, and in the argument the Pennsylvania statute was considered as before the Court, as if given in evidence under the general issue. It was held by the Court that this case was clear of any such sugges-

¹ *Lee and wife v. Colehill*, Cro. Eliz. 527.

² "*Ut res magis valeat quam pereat*, if honesty requires it;" per Lord Kenyon in *Morrys v. Leake*, 8 Term R. 415; see *Kerrison v. Cole*, 8 East, 234; note to *Collins v. Blantern*, 1 Smith's Lead. Cases, 155.

³ 10 Mass. 267.

tion of unlawful participation in the transfer of those lands, as characterized the case of *Belden v. Pitkin*. "The plaintiff was no party to any unlawful purpose, except as he was cheated and deceived to place his money in the hands of the defendant upon a pretended title, which the latter undertook fraudulently and unlawfully to sell, against the laws of the State where he was residing at the time. The defendant, besides conveying the title, covenanted for the sufficiency of it. To deny the plaintiff a remedy upon those covenants would be to aggravate the mischief and leave the defendant in the possession of his emolument, gained by a fraud practiced with impunity." It was held, that nothing transacted within the State of New York was within the first section of the Pennsylvania statute, and that the execution of a deed was not such a conspiring as would be within the second section. It was also held, that although the conveyance was of itself so far illegal as to be void, yet, as respects the consideration, and the covenants collateral to the title for the assurance of the purchaser, this contract, made in another State, with a person there domiciled, and not subject or presumed to be cognizant of the laws of Pennsylvania, was not to be considered as void *ab initio*, "nor," continued Sewell, J., "would it be so considered, I apprehend, if the present demand were made in the courts of that State." It was, moreover, suggested that even "evidence of the falsity of the title conveyed in which the notes originated, would not have been a sufficient defence upon the effect of the Pennsylvania statute, for the covenants are a consideration notwithstanding, on the ground of a failure of the title pretended to be

conveyed." The latter suggestion has, however, more than once been repudiated.¹

It is hard to say that the decision in *Phelps v. Decker* was wrong, under the circumstances of the case. It is distinguishable from the other cases which have been referred to on this statute, because in them the plaintiff came directly within the spirit of the Act, and was really a party to the unlawful traffic. At the same time it is well settled, at least in American law, that a purchaser of land in another State or country, places himself as to those lands in the same position as its subject, and must be presumed to know the *lex loci rei sitæ*, and to be willing that his contract should be governed by it;² and it seems not quite determined whether the mere existence of such statutes as that of Pennsylvania or the champerty acts, will render the transaction wholly unlawful, or whether it is not necessary to show that the purchaser became a party to it knowingly, and in violation of its spirit. Such is the English law at the present day.³

The result, then, of these authorities, as connected with the doctrine of actual seizin, appears to be this. It is probable that the covenant for seizin and of good right to convey, were either introduced or applied in conveyances in some of the colonies in this country, as assurances to the purchaser that there was no such adverse possession as would render the deed inoperative as a muniment of title—as assurances that the vendor had such an actual seizin of the subject of the

¹ 4 Gilman, 393; 4 Scammon, 135. See Chapter XII.

² *Cutter v. Davenport*, 1 Pick. 81; *Horsford v. Nichols*, 1 Paige, 220; *Wells v. Hooper*, 2 Ohio, 124; *Story's Conflict of Laws*, § 365.

³ See the cases cited on page 52, note.

purchase, as would give him a good right to convey it, within the spirit of the statutes referred to. With this interpretation, the language used in the cases which have been referred to appears perfectly intelligible. The only case in which it would appear that the covenants could not be used for that purpose, would be where the purchaser bought with such knowledge of the state of the title, as to bring the case within the champerty acts.

It has been frequently held,¹ without reference to the champerty acts, that the covenant for seizin was broken by the existence of an adverse possession at the time of the purchase, no matter how good the right might be, and that the purchaser was entitled to damages. That such would be held to be the law in New York, seems inferable from the case of *Fitch v. Baldwin*.² It is doubtful whether such would or would not be the course of decision in England at the present day, as the courts there seem disposed to treat mere possession, unaccompanied by right, as destitute of all the qualities of an estate.³ And where⁴ the seller covenanted generally that he was seized in fee without any condition, or other estate, whereby to alter, bar, change, charge, burthen, impeach, incumber or determine the same, and had

¹ *Wilson v. Forbes*, 2 Dev. 30; *Thomas v. Perry*, 1 Peters' C. C. R. 49; *Phelps v. Sawyer*, 1 Aikens, 158-9; *Wheeler v. Hatch*, 3 Fairf. 388.

² 17 Johns. 171.

That case decided that where the holder of the adverse possession himself purchased the premises, he could not hold his vendor liable on the covenant for seizin. "It never can be permitted to a person to accept a deed with covenants of seizin, and then turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed, he himself was seized of the premises."

³ *Doe v. Hull*, 2 Dowl. & Ry. 38; *Cully v. Doe*, 11 Ad. & Ell. 1008; *Doe v. Martyn*, 8 Barn. & Cress. 497; *Jerritt v. Weare*, 3 Price, 575.

⁴ *Jerritt v. Weare*.

good right to convey the same, it appeared that the lady of the manor had previously demised a portion of the subject of the purchase for ninety-nine years, and the lessees had entered upon and continued to enjoy possession. Notwithstanding the able argument of Mr. Preston, it was held by the Court that the covenants did not extend to these leases. It was asked by the Court, What can a man be supposed to covenant against beyond the validity of the title? and most assuredly not against these surreptitious pocket leases. The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of *Hayes v. Bickerstaff*, that the law shall never judge that a man covenants against the wrongful acts of strangers.

Upon this decision Sir Edward Sudgen has made the following remarks: "It will be observed that the leases were accompanied with actual possession by the lessees, who had expended money on the property. They were, therefore, within the covenants, and unless the covenants were held to extend to these leases, general covenants for title would be waste paper. They are always intended to guard against a title adverse to the covenantors, although it may not be a lawful title. Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions subsequent to the conveyance, by persons not claiming lawfully.¹ The case was argued upon much higher

¹ It is in this which distinguishes the case from *Hayes v. Bickershafl*.

grounds, and this probably led the Court not to give due weight to the above simple view of it."¹

It may be thought that too much space has been occupied with these decisions upon the nature of a covenant, which is usually accompanied by others, which would correct, by their own scope and application, any difficulty which could arise from the purchaser's being without remedy, in case of subsequent loss, if he had received an actual seizin at the time of his purchase. But although, if the covenant for seizin were the only one in the conveyance, the questions just considered would be of much practical importance, yet they possess scarcely less, even where there are also covenants for quiet enjoyment or of warranty. For these covenants, which are said to assure the purchaser's possession, are therefore, broken only by his eviction from it; and although the doctrine of constructive eviction has been in some States carried very far, yet there are others which

¹ 2 Vend. 514.

By the higher grounds here referred to, is meant the position assumed by Mr. Preston in the argument in favor of the doctrine of disseizin, as it was supposed by that eminent counsel, (in common with Mr. Charles Butler, and others of almost equal distinction), to have existed at common law, and as opposed to the doctrines enforced by Lord Mansfield, in the case of *Taylor v. Horde*, 1 Burrow, 60. See note to page 33. On these grounds Mr. Preston never forgave the decision in *Jerritt v. Weare*, as his pointed remarks in the preface to the third volume of the "Abstracts of Title" sufficiently testify.

Sir E. Sugden, as will be perceived, gives no opinion as to this, but questions the decision, because the general covenants for title were held not to extend to these leases, under which an adverse possession, defeasible only by an ejectment, had sprung; and his opinion seems to be generally adopted by the profession. *Dart on Vendors*, 367. This is fairly inferable from the fact that Mr. Dart has added to his quotation of the case, "the decision seems of very doubtful authority;" and any opinion or suggestion of Sir E. Sugden that may be in the least open to criticism is unfailingly noticed by this recent author.

refuse to allow a purchaser to elect to consider himself evicted, by buying in the paramount title.¹ Yet there are many instances in which this would be most advantageous to him, (it being always understood that his damages are measured by what he has paid) in preference to waiting till the paramount owner should choose to enforce his title. Many authorities, however, refuse to consider this as an eviction within the covenants for quiet enjoyment or of warranty, and where, under such circumstances, the covenant for seizin is held to have been fully answered by the transfer of the actual seizin, the purchaser is in the same position as if the covenants for quiet enjoyment or of warranty were the only ones in the deed,² and he is obliged to await the time of his involuntary eviction, instead of purchasing in the title, and thus acquiring a right to damages upon his covenant for seizin, to the extent of the amount paid by him.

The doctrine of actual seizin does not, however, seem to prevail throughout the States generally, but only in Maine, Massachusetts, New Hampshire, and to a qualified extent in Ohio. Elsewhere, the covenant for seizin is regarded as a covenant for the *title*, the word being used as synonymous with right,³ and although there would be no question that it would be broken by an adverse possession, continued for the

¹ See Chapter VII.

² *Clark v. M'Anulty*, 3 Serg. & Rawle, 372.

³ *Greenby v. Wilcocks*, 2 Johns. 1; *Morris v. Phelps*, 5 id., 49; *Abbott v. Allen*, 14 id., 48; *Fitch v. Baldwin*, 17 id., 161; *M'Carty v. Legget*, 3 Hill, 134; *Mott v. Palmer*, 1 Comstock, 564; *Hastings v. Welborn*, 2 Verm. 417; *Britton v. Stanley*, 4 Whart. 117; *Pollard v. Dwight*, 4 Cranch, 430; *Fitzhugh v. Croghan*, 2 J. J. Marsh, 429; *Martin v. Baker*, 5 Blackf., 232; *Woods v. North*, 6 Humph., 309; *Pringle v. Witten*, 1 Bay, 256.

In England such has been always the case. *Gray v. Briscoe*, Noy, 142; *Howell v. Richards*, 11 East, 641; *Young v. Raineck*, 7 Com. Bench, 310. In *Gray v. Briscoe*, the word "not" has been inserted by mistake, as the context shows.

length of time required by the limitation Acts, yet such a possession would itself amount to an indefeasible title, which if not marketable, would only be because its validity was a question of evidence rather than of law.

On the whole view, therefore, of this subject, we may conclude, that the weight of American authority is practically opposed to the doctrine of actual seizin being sufficient to support this covenant, and perfectly in harmony with principle.

It may, however, be observed that if the law of covenants for title is abstractly treated as a part of the law of real estate, the student will be constantly led into practical difficulties. The law of real estate is an abstract and artificial system, based upon rules, many of which sprung from, and were applicable to a different state of society. These rules have required to be modified or changed with great caution and delicacy, if at all. It has been generally acknowledged, that it is of less consequence, what may, or may not be the precise rule on a particular branch, than that the rule, when once established, should be looked upon as a rule of property, and, as such, subject, not to judicial, but to legislative alteration. But the law of covenants for title is, as it were, collateral to this system. In part it is subject to its rules, and in part it must be moulded and governed by the intention of the parties as expressed by the tenor of the whole instrument. To say, therefore, that a particular construction given to a certain covenant is, or is not the law of a State, means, practically, no more than that in cases of difficulty, the intentions of the parties will to a certain extent be referable to that construction.

But while the intention of the parties is to be the governing principle, yet it is conceived that in most instances in which the relation of vendor and purchaser is entered into, that intention, when applied to the averment that the vendor is seized, and that he will bind himself to that effect, extends beyond such a mere seizin as will enable the purchaser to obtain possession in the first instance. The want of present possession is a defect which can be discovered by immediate observation or inquiry, and it is not a defect against which a purchaser usually seeks to protect himself, by a covenant. Not so, as to a defect in the ownership.

An analogy may be found in the rule with respect to chattels. In the sale of these, a warranty of title is implied by the civil and the common law.¹ But possession is all that can ever be transferred. Yet a subsequent loss of possession by title paramount, will be a breach of this warranty, because the vendor is understood to have agreed lawfully to transfer a possession which can be retained; and such, it is believed, is the common understanding of purchasers of real estate who receive a covenant for seizin.

There are several questions connected with the covenant for seizin, whose consideration, however, seems more proper under other heads. Thus the capacity of an heir or an assignee to take advantage of this covenant, will be found treated of in the

¹ At least such is the common law of this country, and it was so considered by the profession in England. In a very recent case however in the Court of Exchequer, (*Morley v. Attenborough*, 3 Excheq., 500;) it was held by Baron Park, that there is no implied warranty of title in the contract of sale of a personal chattel. The American cases to the contrary are collected in the note to the reprint of these Reports.

chapter on "the extent to which covenants for title run with the land."¹

So, where a purchaser has, in giving a mortgage for the purchase money, inserted in it the same covenants which he has received from his vendor, the question has arisen whether the former was estopped by his own covenants, from an action on those of the latter. This is considered in the chapter on "the operation of covenants for title, by way of estoppel or rebutter."²

Again, it has sometimes been made a question, whether the covenant for seizin should be so construed, relatively to the *quantity* of land conveyed, as to be deemed an assurance of the existence of that quantity. Abstractly, the question resolves itself into whether a covenant for title implies a covenant for quantity, which is considered in the chapter on "implied covenants,"³ and as a general rule must be answered in the negative.

It is well settled that the covenant for seizin is not broken by the existence of easements or incumbrances, which do not strike at the technical seizin of the purchaser. Thus the existence of a highway over part of the land conveyed, is held no breach of this covenant,⁴ since it has been consistently settled, that although the people have a right of passage over the way, the freehold technically remains in the owner of the soil, in respect to which he may maintain trespass and ejectment.⁵

¹ Chapter VIII.

² Chapter IX.

³ Chapter X.

⁴ *Whitbeck v. Cooke*, 15 Johns. 483.

As whether a public road is a breach of the covenant against incumbrances, see Chapter IV.

⁵ 2 Inst. 705, *Goodtitle v. Alker*, 1 Burrow, 133; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Jackson v. Hathaway*, 15 Johns. 449; *Lewis v. Jones*, 1 Barr, 336; *Peck v. Smith*, 1 Conn. 103-147.

So with respect to a judgment, a mortgage, or the expectant right of the wife to dower; however much these may operate as a breach of the covenant against incumbrances, they do not affect the covenant for seizin,¹ since a judgment, or a right of dower, do not operate to divest the technical title or seizin of the grantor; and a mortgage, although in strictness it purports to pass the legal title, yet is almost universally regarded, at the present day, as a mere security for the payment of the debt. If, however, the mortgagee had entered under his mortgage (as is allowed by local statutes in many States,) the covenant would, it is supposed, be held to be broken.

Subject to these qualifications, the covenant extends not only to the land itself, but to all such things as should be properly appurtenant to it, and pass by a grant of the freehold; and in a very recent case² it was held to be broken, where the grantor had, before conveyance, sold to another a quantity of rails which had been erected into a fence, and thereby formed part of the freehold. A similar principle has been applied with respect to the covenant of warranty, to buildings upon the land, the right to remove which, was vested in other parties, and did not pass to the purchaser by the conveyance.³

Whatever difference of opinion may have existed, and still exists, with respect to the scope and nature of the covenants for seizin, there appears to be none as to the forms of pleading in an action brought upon it.

¹ *Backus' Admrs. v. M'Coy*, 3 Ohio, 218; *Tuite v. Miller*, 10 id., 383; *Fitzhugh v. Croghan*, 2 J. J. Marshall, 430; *Sedgwick v. Hollenback*, 7 Johns. 380.

² *Mott v. Palmer*, 1 Comstock, 527.

³ *West v. Stewart*, 7 Barr, 122. This case came again before the Court on another ground: 2 Harris, 336.

It has been settled from an early period that in assigning the breaches of the covenants for seizin and for good right to convey, it is unnecessary to do more than negative the words of the covenant generally. In *Bradshaw's case*,¹ which was an action brought on a covenant in a lease that the lessor had full power to convey, it was held, "to lie more properly in the knowledge of the lessor what estate he himself has in the land which he demises, than the lessee, who is a stranger to it; and therefore the defendant ought to show what estate he had in the land at the time of the demise made, by which it might appear to the Court, that he had full power and lawful authority to demise it." In *Glinnister v. Audley*,² which was the case of a covenant in a conveyance of a freehold, it was endeavored, on demurrer, to distinguish this case from that just cited, "because the plaintiff ought to have shown of what estate the defendant was seized, in regard he had departed with all his writings concerning the land, in presumption of law, and therefore the plaintiff well knew the title; and it is not like to *Bradshaw's case*, because there the covenant was with the lessee for years, who had not the writings." But this distinction was not recognized, and the rule in *Bradshaw's case* has since been consistently adhered to, and applied as well to covenants in a conveyance of a freehold as of a leasehold estate.³

¹ 9 Coke, 60.

² T. Raymond, 14.

³ *Muscat v. Ballet*, Cro. Jac. 369; 2 Saund. 181 b. note 10; *Bender v. Fromberger*, 4 Dall. 436; *Clark v. McAnulty*, 3 S. & R. 372; *Marston v. Hobbs*, 2 Mass. 433; *Greenby v. Wilcocks*, 2 Johns. 1; *Abbott v. Allen*, 14 id. 248; *Pollard v. Dwight*, 4 Cranch, 430; *Duval v. Craig*, 2 Wheat. 62, note; *Mackey v. Collins*, 2 Nott and McCord, 186; *Lot v. Thomas*, 1 Pennington, 407; *Rickert v. Snyder*, 9 Wend. 421. It was, however, otherwise

As a consequence of this, these cases also determine, that in an action on this covenant it is unnecessary either to aver an eviction in the declaration or lay any special damage.¹ A distinction thus exists as respects the pleadings, between the covenant for seizin, (with which may be classed the covenant for right to convey,) and other covenants for title, as in suing upon such covenants, it seems, in the first place, generally necessary that the incumbrance or paramount title should be particularly specified in the declaration, as well, perhaps, as the results which it has caused.²

Nor does it seem necessary in suing on the covenant for seizin, that the subsequent pleadings should set forth the particulars of the paramount title. Although in *Marston v. Hobbs*,³ Mr. Chief Justice Parsons, in stating some general propositions, remarks that "the defendant in his bar should regularly maintain his seizin, and then the plaintiff in his replication should aver who in fact was seized;" yet, as was said in *Abbot v. Allen*,⁴ that case presented a question of *evidence* merely, and not a question of *pleading*. "All that is incumbent on the plaintiff," said Mr. Justice Platt, "is to negate the title of the defendant, who pleads affirmatively and generally that he had a good title, and the general replication in this case is sufficient. This differs from the class of cases where the plea avers a general performance of the covenant; and then the plaintiff is required in his replication to

formerly, in Ohio, under a local statute, which has since been repealed. See *Robinson v. Neil*, 3 Ohio, 526. The early case to the same effect in Connecticut, of *Wilfrid v. Rose*, 2 Root, 14, must probably have proceeded on some local statute, as otherwise it is opposed to the current of authority.

¹ *Abbott v. Allen*, 14 Johns. 248; *Bird v. Smith*, 3 English, 368.

² See *infra*, 121.

³ 2 Mass. 433.

⁴ 14 Johns. 248.

specify wherein the breach has been committed, for instance, in an action of covenant for not repairing a leased messuage, the declaration may assign the breach generally, that the covenantor did not repair, etc.; the defendant may then plead generally a performance of his covenant; and the plaintiff, then, is required in his replication, to specify wherein the repairs have been omitted, in order that the defendant may be apprised, with reasonable certainty, what is the object of the suit. The reasons for requiring such a special replication are, 1st, That the subject to which the covenants relate, is perfectly known to the party complaining of the breach; and, 2dly, The suit has a more general aspect, and the subject of the breach is multifarious. Therefore, the law in such case, most reasonably requires the replication to specify that a chimney has fallen down; that the windows are broken; and that the barn is unroofed; or that the fences are prostrate, etc. In this case, the point in controversy is single and abstract. The question is, merely, whether the defendants had an indefeasible title? and the only evidence in relation to that title may be exclusively in the power of the defendants."

As respects the burden of proof, it is well settled that in suing upon the covenants against incumbrances, for quiet enjoyment, or of warranty, it is cast upon the plaintiff, in the first instance, who is obliged to make out the paramount title with all the particularity of a plaintiff in ejectment.¹

It is doubtful how far such a rule is applicable to actions on the covenant for seizin. On the one

¹ Thus in *Kennedy v. Newman*, 1 Sandf. S. C. R. 187, the plaintiff was non-suited because he did not step by step prove the regularity of proceedings under a ministerial jurisdiction by which his title had been divested.

hand it would seem that the rule as to the evidence should correspond with the rule as to the pleadings, and that the knowledge of the state of the title being supposed to rest with the defendant, he is bound in the first instance to maintain the affirmative of his covenant. On the other hand, it would seem contrary to general principles that a vendor who had given a covenant for seizin could be called upon at any time after the execution of the deed, and at the caprice of his covenantee, to make out affirmatively a perfect title, without a defect or some loss having been shown in the first instance. It is probable that the true rule is to be found between these extremes, and while a plaintiff is not obliged to prove the defect with the particularity required in suing on the other covenants, he cannot throw entirely upon his vendor the burden of maintaining the perfection of the title he has conveyed.

Few subjects in the law have given rise to more discussion in this country, than the question of the measure of damages upon covenants for title. Comparatively little light has been thrown upon the subject by English authority, since the period when these covenants have superseded the ancient warranty. The rules of the civil law, in its earnest endeavor to afford in every case a full compensation for the injuries suffered, are in some instances so varied as to be almost arbitrary.¹ On this side of the Atlantic the subject has been handled with fullness and precision, which is readily accounted for by its great practical

¹ See *passim*, Sedgwick on Damages, 24, 27.

importance here, where the value of land is constantly varying, owing to rapid improvement or other circumstances incidental to the settlement of a new country. Notwithstanding the discussions which the subject has received, the measure of damages, on the covenants for quiet enjoyment and of warranty, has been regulated by a different standard in different States. But as respects the covenants for seizin and of good right to convey, the doctrine that was announced in a few early cases, has been consistently followed and observed throughout the Union, and it has become a settled rule, that in an action upon the covenant for seizin, the damages are limited by the consideration money and interest. As a general rule, this is the standard. They may under some circumstances fall below, but can never exceed it.

The question of the measure of damages on a covenant for seizin, seems to have been first presented in this country, in the year 1805, in the case of *Staats v. Ten Eyck*,¹ and to the principles there partially advanced, but more fully considered in the ensuing year in Pennsylvania, in *Bender v. Fromberger*,² and again in New York, in 1809, in *Pitcher v. Livingston*,³ consistent assent has been given.

It has been elsewhere said⁴ that some diversity of opinion has existed at the present day, as to whether the remedy afforded upon a voucher to warranty or a *warrantia chartæ*, was restricted to other lands, or whether, in default of these, damages were awarded in their place. However this may be, it is perfectly clear, that the measure of value was taken to be that existing at the time the warranty was entered into,⁵

¹ 3 Caines, 111. ² 4 Dallas, 436. ³ 4 Johns. 1. ⁴ See Chapter VII.

⁵ 19 Hen. VI. 45, 46. Brooke's Ab. Voucher, pl. 69. Recouer in Value, pl. 59.

and the introduction of covenants for title in place of warranty, does not seem to have altered the measure of compensation,¹ but the damages, like the value of the feud given as a recompense, or its equivalent, received no increment, either from the rise of the property by adventitious means or by improvements put upon it.

In the case of *Staats v. Ten Eyck*, the question before the Court was limited to whether the vendor should be held liable for a rise in the value of the land from adventitious sources, and independent of beneficial improvements, and the policy of adhering to the rule which governed the remedy in the ancient action of warranty, was declared by Ch. J. Kent to be not only in accordance with authority, but based upon reasonable principles. The want of title usually originated, it was said, in mutual error, the vendor disclosing his proofs and knowledge of the title, and the vendee examining for himself—and it would hamper the growth of a country whose resources were yet undeveloped, if a vendor were obliged to restore to a purchaser the increased value of land arising from the discovery of a mine or the progress of a town in its neighborhood.

The common-law doctrine was therefore adhered

¹ It is a little singular, that the case of *Flureau v. Thornhill*, 2 H. Black. 1078, has in several instances been cited as a direct authority for this position. That case decided no more than that upon a contract for the purchase of real estate, to which the vendor was (without fraud) unable to make a title, the purchaser was not entitled to damages for the fancied goodness of the bargain which he had lost. The truth is, as was correctly said in *Cox's heirs v. Strobe's heirs*, 2 Bibb, 277, that it is rather from the absence of decisions in England, that we must arrive at this conclusion: "In all the comments made by the elementary writers on the change introduced by the covenants for title, none mention any change in the amount of recompense to the plaintiff, which would scarcely have happened in case these covenants had introduced a new measure of damages."

to, and the measure of damages on a breach of the covenant for seizin, declared to be the value of the lands at the time of sale, and the best estimate of this was found in the consideration money paid, and to counterbalance the claim for mesne profits, it was deemed proper to allow interest upon this amount whenever they could properly be recovered by the paramount owner. The question of how far the vendor should be liable to make good the outlay of the purchaser in beneficial improvements, was not then presented.

This case was followed in Pennsylvania by *Bender v. Fromberger*,¹ where a special verdict was found for the plaintiff, subject to a considerable reduction if the Court should be of opinion that the plaintiff was not entitled to recover the value of the improvements made by him after his purchase. It seems to have been strongly urged on behalf of the plaintiff² that the measure of damages on all covenants was the amount of loss actually sustained, and that the reason why in a *warrantia chartæ* the recovery was confined to the original value of the land was because in real actions no damages were recovered. But it was held by Chief Justice Tilghman, that in the latter case, the value at the time of the voucher might have been recovered without recovering damages, as appeared from *Ballet v. Ballet*,³ where it was held that in a *warrantia chartæ* if there were new buildings of which also warranty was demanded, the defendant must take care to come in and answer the voucher to war-

¹ 4 Dallas, 436.

² From what the Court said of the arguments of counsel, it is to be regretted that they are not more fully reported.

³ Godb. 152.

ranty only for so much as was at the time of making the deed, otherwise the plaintiff would recover according to the value at the time of bringing the action.

“It has been contended,” continued the Chief Justice, “that the true measure of damages in all actions of covenant is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment. The rule contended for by the plaintiff’s counsel, in its utmost latitude, applied to covenants like the present, would in many instances produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule, by confessing that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons who have sold lands on which no other than useful buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the United States, is such that it can hardly be supposed any prudent man would undertake to answer the incalculable damages which might overwhelm his family under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this State, prior to the American Revolution; and I think myself warranted in asserting, from the information I have received, that the prevailing opinion

among the most eminent counsel was, that the standard of damages was the value of the land at the time of making the contract."¹

But in the case of *Pitcher v. Livingston*,² the importance of the question was felt to be such that the whole matter was treated as *res integra* and carefully considered. The declaration contained two counts, one for breach of the covenant for seizin, the other for that of the covenant for quiet enjoyment, and the questions reserved were whether the plaintiff was entitled to recover interest on the consideration money, and whether he could recover damages for improvements and for increased value of the land.

It was said by Van Ness, Ch. J., and Kent, J., that as to the allowance of interest no doubt could be entertained as to the propriety of the decision in *Staats v. Ten Eyck*. It had been adopted in Pennsylvania and in Massachusetts.³ That as to allowance for improvements, the common law was unquestioned. If land be better after feoffment, by buildings or otherwise, he who receives in value, receives as the land was worth at the time of feoffment, and no more.⁴

¹ The case of *Staats v. Ten Eyck*, was referred to in the course of the argument, as also the cases of *Liber v. Parsons*, in the year 1785, and *Guerard's Executors v. Rivers*, in 1792, (both reported in Bay's South Carolina Rep. 19, 266, and both since overruled,) where the standard of damages was held to be the value at the time of eviction. These cases were said by Ch. J. Tilghman to have been decided in the hurry of a jury trial, and not founded on the mature deliberation given by the New York judges in *Staats v. Ten Eyck*. It must be observed also, that the South Carolina cases were both actions on covenants of warranty, and not on a covenant for seizin; and the distinction between the measure of damages on these two covenants is still recognized in several of the States, though long since repudiated in South Carolina.

² 4 John. 1.

³ See *Marston v. Hobbs*, 2 Mass. 433.

⁴ 30 Edward III. 14 b.; 19 Hen. VI. 46 a.

See also 47 Ed. III. 32, where it is said, "On voucher if special matter

It was never designed by the introduction of covenants to establish any other value of damages. The rule of the civil law left the damages to an arbitrary and undefined discretion and destroyed any thing like a fixed rule. Whatever expectation of rise in value the purchaser may have had, were confined to him alone and could not have entered as an ingredient into the bargain. It was the land and its price at the time of sale which the parties had in view, and to that subject the operation of the contract ought to be confined. Notwithstanding the dissent of Judge Spencer, the able opinions by the majority of the Court seem never in substance to have been departed from in any of the States.¹ It must, however, be

be shown by the vouchec, viz. that the land at the time of the feoffment was worth only £100, and now at the time of the voucher is worth £200 by the industry of the feoffee, the tenant shall recover only the value as it was at the time of sale; for if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty."

¹ Decisions to this effect may be found in nearly every State in the Union, in which the covenant for seizin is employed. Some of them are *Marston v. Hobbs*, 2 Mass. 433; *Smith v. Strong*, 14 Pick, 128; *Stubbs v. Page*, 2 Greenl. 376; *Mitchell v. Hazen*, 4 Conn. 495; *Sterling v. Peet*, 14 id. 234; *Whiting and Wife v. Nissly*, 1 Harris' Pennsylvania Reports, 655; *Tapley v. Lebeaum's Exrs.* 1 Missouri, 550; *Martin v. Long*, 3 id. 391; *Wilson v. Forbes*, 2 Dev. 30; *Logan v. Moulder*, 1 Pike, 323; *Bachus v. McCoy*, 3 Ohio, 211; *Clark v. Parr*, 14 id. 121; *Cummins v. Kennedy*, 3 Litt. 118; *Cox's Heirs v. Strode's Heirs*, 2 Bibb. 277. *Nichols v. Walter, et al*, 8 Mass. 243 was a very strong case. The plaintiff had received a covenant for seizin from the defendant's testator in a conveyance of property in New Hampshire, the consideration for which was \$18 67. The plaintiff sold the property for \$133 33, with covenant for warranty on which he was sued by his grantee, who had been evicted from the possession, and then recovered \$555 49, being the value of the land at the time of eviction, this being the New Hampshire measure of damages on the covenant of warranty. Notwithstanding these circumstances, the plaintiff was limited in his recovery to the amount which he had himself paid for the property.

The rapid increase of improvements in a new country, has led to the passage, in some of the States, of statutes known as "the occupying claimant law," by which, in some cases, the paramount owner is obliged to pay to the

noticed that the rule of the consideration money forming the measure of damages must be applied in its generality only to the covenant for seizin. On the covenants for quiet enjoyment and of warranty, a different standard prevails in many of the States, the damages being assessed by the value of the land at the time of eviction.¹

The cases, moreover, which have followed in the train of *Bender v. Fromberger*, and *Pitcher v. Livingston*, are all based upon an absence of fraud on the part of the vendor, and it seems to be at least doubtful whether, in that form of action, fraud can be taken advantage of by the purchaser. Mr. Chief Justice Van Ness, remarked in the case last referred to, "If any imposition is practised by the grantor, by the fraudulent suppression of truth or suggestion of falsehood in relation to his title, the grantee may have an action on the case in the nature of a writ of deceit, and in such action he would recover to the full extent of loss. (Harg. & But. notes to Co. Litt. 384, a. tit. Warranty; 1 Fonb. Eq. 366; Com. Dig. 236, A.)" And although in *Bender v. Fromberger*, Mr. Chief Justice Tilghman, remarked, "If the seller make use of any fraud, concealment or artifice to mislead the purchaser in examining the title, the case is different, he will be answerable for all losses which may ensue,"

occupying claimant the value of all permanent and lasting improvements, unless the latter should refuse, on demand, to pay to the former the value of the land without the improvements. See Statutes of Ohio (ed. of 1841) 607; *Hart v. Baylor*, 1 Harden, 598; *Cox v. Strode*, 2 Bibb, 278. This is the familiar rule in equity when a party lawfully in possession, under a defective title, has made permanent improvements, the true owner, if he come into equity to obtain his estate, is compelled to allow for such improvements. 2 Story's Eq. § 799, 1239.

¹ See Chapter VII.

yet it would be difficult to conceive how, in the action on the covenant, the jury would be allowed to increase the damages beyond the extent of the consideration money,¹ as the distinction between such an action, and one in the nature of a writ of deceit is an obvious one.

As in analogy to the ancient warranty, the value of the land at the time of its conveyance, forms the basis of the measure of damages, so the consideration expressed in the deed is deemed to be *prima facie* the best evidence of this value, since such was the agreement of the parties at the time, as expressed in the deed.² It becomes, then, matter of great practical importance, to know how far evidence is admissible, either on the part of plaintiff or defendant, to show that the consideration of the purchase was actually greater or less than thus expressed. Whatever may be the unwillingness manifested by the English cases,³ to sanction the introduction of any evidence inconsistent with any part of a statement in a deed, such reluctance seems to have been much overcome in this country; and it is well settled by American authority that although (apart from all question of fraud) evidence to explain or vary the consideration is inadmissible, if introduced either directly or indirectly to defeat the conveyance (as by showing it void, because

¹ *King v. Pyle*, 8 Sergt. and Rawle, 166, was not an action on a covenant for title, but a defence to payment of the purchase money of land which had been sold with fraudulent representations as to its quantity.

² *Marston v. Hobbs*, 2 Mass. 433; *Smith v. Strong*, 14 Pick. 128; *Tapley v. Lebeaum's Executors*, 1 Missouri, 550; *Cummins v. Kennedy*, 3 Litt. 118; *Wilson v. Forbes*, 2 Dev. 30.

³ Some of the later of these are *Rowntree v. Jacob*, 2 Taunt. 141; *Sampson v. Corke*, 5 Barn. and Ald. 606; *Baker v. Dewey*, 1 Barn. and Cress. 704.

not founded on a valuable consideration,)¹ yet that for any purpose short of affecting the title, the consideration clause is not only no conclusive evidence that the money was paid, but is only *prima facie* evidence of the amount,² which may by parol proof be shown to be greater or less than that expressed in the deed.³

There are some earlier cases, and even some dicta

¹ As in *Wilt v. Franklin*, 1 Binney, 502; *Hurn v. Soper*, 6 Harr. and Johns. 276.

² *Bullard v. Briggs*, 7 Pick. 533; *Wade v. Mervine*, 11 id. 288; *Clapp v. Tirrell*, 20 Pick. 247; *McCrea v. Purmort*, 16 Wend. 460; *Burbank v. Gould*, 15 Maine, 118; *Meeker v. Meeker*, 16 Connecticut, 383; *Beach v. Packard*, 10 Vermont, 96; *Bingham v. Weiderwax*, 1 Comstock, 509; *Watson v. Blain*, 12 Serg. and Rawle, 131; *Bolton v. Johns*, 5 Barr. 145; *Higdon v. Thomas*, 1 Harr. and Gill, 139; *Wolfe v. Haner*, 1 Gill, 84; *Duval v. Bibb*, 4 Hen. and Munford, 113; *Harvey v. Alexander*, 1 Rand. 219; *Curry v. Lyles*, 2 Hill, (S. C.) 404; *Jones v. Ward*, 10 Yerger, 166; *Garret v. Stuart*, 1 McCord, 514; *Gully v. Grubbs*, 1 J. J. Marsh, 388; *Hartley v. McAnulty*, 4 Yeates, 95; *Hayden v. Wentzer*, 10 Serg. and Rawle, 329; *Jack v. Dougherty*, 3 Watts, 158, where the language of Parker, C. J., in *Bullard v. Briggs*, is approvingly quoted; *Monahan v. Colgin*, 4 Watts, 436; *Strawbridge v. Cartledge*, 6 Watts and Serg. 399.

³ In other words, that the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed was merely to prevent a resulting trust to the grantor, the clause being merely formal or nominal, and not designed to fix conclusively the amount either paid or to be paid. *Belden v. Seymour*, 8 Conn. 312. In *McCrea v. Purmort*, where many authorities are collected and commented on, Cowen, J., held the following language: "Whenever a right is vested or created or extinguished by contract or otherwise, and writing is employed for that purpose, parol evidence is inadmissible to alter or contradict the legal and common sense construction of the instrument; but any writing which neither by contract, the operation of law, or otherwise, rests or passes or extinguishes any right, but is only used as evidence of a fact, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a deed, a will, or a covenant in writing, so far as they transfer or are intended to be the evidences of rights, cannot be contradicted or opposed in their legal construction by facts *aliunde*. But receipts and other writings which only acknowledge the existence of a simple fact, such as the payment of money,

in later ones, which appear to lean the other way,¹ but the weight of American authority has settled the principle as just stated.

As a consequence of this it is held that in an action on the covenant for seizin, evidence is admissible on the part of the plaintiff, to show the actual consideration to be greater than that expressed in the deed, for the purpose of increasing the damages;² and on the other hand equally admissible on the part of the defendant to show the consideration less, for the purpose of diminishing them;³ so, it has been held admissible for the defendant to show in reduction of

may be susceptible of explanation and liable to contradiction by witnesses." So in Massachusetts the rule was thus broadly laid down by Parker, C. J., in *Bullard v. Briggs*, 7 Pick. 533. "The consideration proposed to be proved is different from that expressed in the deed, and it is objected that the deed is conclusive upon this point; but we think it has been reasonably settled that this matter is open to evidence. More or less than is expressed in a deed may be proved by parol evidence as the consideration; and even a different consideration, if valuable, may be proved."

¹ *Schermerhorn v. Hayden*, 1 Johns. 139; *Harris v. Parker*, 3 id. 508; *Maighley v. Hauer*, 7 id. 342; *Steele v. Adams*, 1 Greenl. 1; *Clark v. McAnulty*, 3 S. & R. 367. *Bronson, J.*, in *Greenvault v. Davis*, 4 Hill, 643, seemed to be of opinion that when the deed contained no covenants but those for seizin or warranty, the consideration was inserted for the purpose of fixing the amount of damages in case of a loss of the estate, "At least such is my present impression, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question." "I submit, however," says Mr. Sedgwick, in quoting this passage, "that any distinction as to the purpose for which the parol proof is admitted cannot be maintained. If good for one end, it must be good as to all. If a fact be established, all its legitimate results must follow, whether as to rights or remedies; and in the sister States of the Union it seems to be generally held that parol proof is admissible as to the quantum of consideration paid." *Measure of Damages*, 178. These remarks must be taken subject to the qualification above referred to, that such evidence is inadmissible if it goes to destroy the efficacy of the deed as a conveyance.

² *Belden v. Seymour*, 8 Conn. 304.

³ *Morse v. Shattuck*, 4 New Hamp. 229; *Harlow v. Thomas*, 15 Pick. 70; *Bingham v. Weiderwax*, 1 Comstock, 514; *Moore v. McKee*, 5 Smedes and Marshall, 438.

damages that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it.¹

But the rule that the measure of damages upon a breach of the covenant for seizin, is the consideration money with interest, must be applied only relatively to the question of increased value of the land; in other words, the consideration money with interest is *the extent* to which damages can be recovered upon this covenant, under any circumstances into which fraud does not enter. However abstractly fixed, therefore, by the actual consideration the measure of damages may appear to be, practically it has a wide range, varying between the consideration money in the one extreme, and nominal damages in the other.

Professor Dane has remarked,² "In respect to the amount of damages, if the grantee has been turned out of, and lost the land, there is no question but that the said consideration and interest is the true amount; but if he remains in possession of the land, and has not been ousted or evicted, it is an important question if he shall recover his said consideration money and interest, while he so retains the land."

In either way in which the question may be considered, it is not altogether free from difficulty.³ If

¹ Barnes v. Learned, 5 New Hamp. 264; Leland v. Stone, 10 Mass. 463.

² 4 Dane's Abridgment, 340.

³ "As we understand the law," said Hutchinson, C. J., in Catlin v. Hurlburt, 3 Vermont, 409, "it is deficient in guarding the rights of the grantor in a case that may arise. The grantee may have honestly purchased the premises and taken possession; after his sale his grantor may have taken possession. The first grant proves defective, but he in whom the legal title is does not interfere. These possessions continued will soon form a good title. If there is a recovery on the covenant for seizin, these possessions should go for the benefit of him of whom the recovery is had. This presents a fit subject for legislation. A statute might provide * * * that the recovery and

on the one hand, the purchaser were allowed under these circumstances to recover back the consideration, it would be clearly wrong that he should retain the possession of the land. The vendor might possibly be driven into equity in order to regain it.¹ On the other hand, if only nominal damages were allowed, the question would then arise whether another action could be sustained upon the same covenant on a subsequent occasion, when the actual damage had happened.

There can be no question, that even although a right of action may exist upon the covenant for seizin, yet if the title has become perfected,² whether by lapse of time, by force of other covenants, or by other circumstances which have not involved the pur-

collection should revert all right and possession in the grantor, from whom this recovery and collection is had. This would do justice in all cases that should come within it."

¹ This is the difficulty which Mr. Wilcox suggests has been the cause of holding, in some of the northern States, that the covenant for seizin is not broken at all if an actual seizin has passed to the purchaser. But, as has been remarked, the doctrine goes beyond the exigencies which may have given rise to it, for the purchaser has then no remedy if an actual seizin has been transferred to him, even though he should afterwards lose the land.

² A case where the title has become perfected, must be distinguished from those where the vendor offers to perfect it, in which latter case it has been held that the purchaser has his option either to accept the perfect title or to sue upon the covenant, and Equity will not entertain a bill to compel him to do the former in preference to the latter. *Tucker v. Clark*, 2 Sand. Ch. 96. See this case quoted in Chapter XI. *infra*. In *Bingham v. Weiderwax*, 1 Comst. 513, Van Buren agreed with a corporation to purchase of them a tract of land for \$850 in cash, subject to two mortgages, amounting together to \$3000. On the appointed day, the President and certain of the Directors executed a deed for the premises, "in consideration of \$3,850, and subject to the two mortgages mentioned in the aforesaid articles of ejectionment," covenanting that they were the true and lawful owners in right of the corporation, and were seized of a perfect estate in fee simple, and had good right to convey. This deed did not pass the title of the corporation, which was afterwards dissolved. Van Buren went into possession, but not paying the mortgages, they were foreclosed in 1843, and sold, when his administrators

chaser in actual loss, the damages which can be recovered, will be but nominal. Thus in a recent

sued the grantors on their covenant for seizin. The latter filed a bill for a perpetual injunction of this suit, on the ground that at the time of the conveyance, all the parties understood that it was sufficient to pass the title, and that the premises had been sold by reason of the mere neglect of Van Buren to pay the mortgages. A demurrer to the bill was overruled by the Vice Chancellor, but the Court of Appeals reversed this decision, and Jewett, C. J., in delivering the opinion of the Court, said, "The bill concedes that the title to the lands was not conveyed to Van Buren, although he, as well as his grantors, supposed it was, by the deed executed to him. The complainants and the administrator of Van Buren have since discovered that Van Buren's grantors were never seized of any estate in the lands; that the turnpike corporation, at the time of executing the deed, was seized of these lands, and so continued, until its dissolution in 1840. How then can it be said that Van Buren lost the land or the title thereto, (which he never had), by neglecting to pay the mortgage? If he had paid it, it would not have invested him or his grantors with the title. Neither lost the land, or title to it, by the foreclosure and sale. Payment of the mortgage by Van Buren in his lifetime, or by his administrator after his death, could have had no other effect than to increase the amount of damages which he or his administrator would be entitled to recover of his grantors for the breach of their covenant of seizin contained in their deed to him. Van Buren's right of action for the breach of that covenant was perfect the instant the deed was executed. *Hamilton v. Wilson*, v. John. 72; *McCarty v. Leggett*, 3 Hill, 134. It did not arise or depend in any respect upon the foreclosure of the mortgage and sale under it. Nor did the foreclosure and sale in the least affect the complainant's rights or liabilities. If Van Buren had paid the mortgages, and then he or his administrator, after his death, had brought an action for the breach of the covenant of seizin, it would not have been a good ground in equity for relief against their covenant, that he could have compelled the corporation before its dissolution to convey the title to him. He would have the right to rely on his covenant, and take his remedy by action upon it.

Van Buren's grantors agreed with him that they were seized of the land, and it was their business to see that their covenant in that respect was kept, when they executed the deed. Equity may compel parties to execute their agreements, but has no power to make agreements for them, or to substitute one for another. And besides, it appears from the bill that the corporation even did not lose the land or its title by the foreclosure and sale under the mortgages. It had lost its title nearly or quite three years before, in 1840, by its dissolution. At that time, and for that cause, the title reverted back to its original grantor or his heirs, there being no provision in its charter or in any other statute to avert that consequence upon its dissolution. *Angel & Ames on Corp.* 128, 129; 2 *Kent's Com.* 305.

case,¹ though the covenant for seizin, on which the action was brought, was unquestionably broken, yet the purchaser had subsequently acquired a valid title, which was held to enure to him by virtue of his covenant of warranty² (under the peculiar effect given to that covenant by way of estoppel in the Northern States,)³ and it was held that he was entitled to nominal damages only, "it being altogether inequitable that he should have the seizin, and be allowed besides to receive back the consideration paid for it."⁴

At all events, the bill shows the dissolution of the corporation at the time mentioned, without showing that the title to their lands was saved in such manner as that Van Buren, or his representatives, could by any means have acquired it under the agreement and deed, even if he had paid the mortgages subsequently and before foreclosure; and it is not set up that he had agreed to pay, or that the holders of the mortgages were bound to receive, or would have received payment of the mortgages, or either of them, prior to the time of the dissolution of the corporation, or prior to the time of the death of Van Buren; or that he at any time knew or had notice that he could compel the corporation, or any other person, to convey to him the title to said land; or even that he knew or was informed that his grantors were not seized when they executed the deed. Therefore it seems to me that there is no ground upon which to sustain this bill, founded upon the neglect of Van Buren to pay the mortgages, or either of them."

¹ *Baxter v. Bradbury*, 20 Maine, 260.

² So in *Cornell v. Jackson*, 3 Cushing, 510, 511.

³ See Chap. IX.

⁴ *Garfield v. Williams*, 2 Vermont, 329; *Wilson v. Forbes*, 2 Dev. 30; approved in *Cowan v. Silliman*, 4 id. 47.

This rule has sometimes been sought to be carried too far, and to entitle the defendant to a verdict. Thus in *McCarty v. Legget*, 3 Hill, 134, the defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a bar to the plaintiff's recovery on his covenant for seizin, and a verdict was therefore ordered for the defendant. But it was held by the Supreme Court, that however these facts might have been properly admissible in mitigation of damages, still that the purchaser had a right to recover at least nominal damages, since the covenant was technically broken at the time of suit brought, and the subsequently acquired title did not enure to him by way of estoppel, as it would have done under the principles of law as settled in the Northern States, had the deed contained a covenant of warranty. It is this which distinguishes the case in that respect from *Baxter v. Bradbury*. It has, however, been held with respect to the covenant against incumbrances, that not even a technical

Such a course of decision is obvious, and the cases free from difficulty. But the Courts seem practically to have gone farther, and to have held, that even although the title may not thus have been perfected, yet that if the purchaser have at the time of the verdict suffered no actual loss, and more especially if he still retain the possession, nominal damages only can be recovered. Any amount which he may have paid for the purpose of perfecting the title, he would of course be entitled to recover, and such an amount would form the measure of the damages, provided it did not exceed the consideration money.¹ But if nothing had been paid, if no pecuniary loss had been suffered, and the possession had not been disturbed, and the purchaser did not offer to reconvey, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant for seizin is broken, if at all, at once and completely as soon as it is made, is, as respects the damages, little more than a technical one.²

Cases may of course occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet where the failure of title is so complete, and the loss so morally certain to happen, that a Court might feel authorized in directing the jury to assess the damages by the consideration money.³ In such case it might be proper, and even necessary, for the plaintiff to offer to reconvey the interest or title actually vested in

breach will be caused by the existence of a mortgage which is unsatisfied of record, but which has, in fact been paid either directly or collaterally. *Indevine v. Pennock*, 16 Verm. 685.

¹ *Spring v. Chase*, 22 Maine, 509.

² *Collier v. Gamble*, 10 Mi., 472-3.

³ *Harris v. Newell*, 8 Mass. 263.

him.¹ This, however, would probably be a matter for the discretion of the Court. It would be no bar to his action that he had not done so,² but the Court might stay the execution, or reserve the actual entry of the judgment, till such reconveyance were made. In actions on the other covenants such a rule would not be applied.³

The question then arises whether, after a recovery of nominal damages, a suit can be maintained upon the covenant at a subsequent period, when actual loss has happened. It would appear that the question must be answered in the negative, and that the former recovery could be successfully pleaded in bar. The general principles of the law of estoppel, as applied to judgments *in personam*, were clearly stated by Lord Ellenborough in *Outram v. Morewood*.⁴ In *Markham v. Middleton*,⁵ the defendant had suffered judgment to go by default, but when the plaintiff went before the jury of inquiry for damages, he failed in his proof, and the damages were assessed at one penny. Under the circumstances of the case, the Court ordered a new writ of inquiry on payment of costs; but as Lord Kenyon remarked of this case,⁶ in another action the plaintiff would have been barred by that verdict, if it had stood; and the same remark was made by Park, J., in *Godson v. Smith*.⁷ The point seems to have directly arisen in *Maine*,⁸

¹ 2 Sugd. on Vend. 358.

² See *Bender v. Fromberger*, 4 Dall. 437; *Ives v. Niles*, 5 Watts, 329.

³ *Ives v. Niles*, 5 Watts, 329.

⁴ 3 East. 346; and see *Church v. Leavenworth*, 4 Day, 274; *Ryer v. Atwater*, id. 431; *Canaan v. Turnpike Co.* 1 Connecticut, 1.

⁵ 2 Strange, 1259.

⁶ *Seddon v. Tutor*, 6 Term 609.

⁷ 2 Moore, 162.

⁸ *Donnell v. Thompson*, 1 Fairf. 174.

where Mellen, Ch. J., remarked: "The action on the covenant of freedom from incumbrance was prematurely brought, and nothing but nominal damages were recovered. Still it is admitted that the judgment in that action would be a good bar to a second action on the *same* covenant, for the *same* breach."¹ The plaintiff's proper course under circumstances where he perceives that his action must result in nominal damages, is to discontinue or suffer a nonsuit, which will not of course affect his right to a subsequent recovery.²

It is well settled that while upon a total breach of this covenant a purchaser may, as a general rule, recover the whole consideration money, so where there is a partial breach he may recover *pro tanto*. Thus in the early case of *Gray v. Briscoe*,³ one covenanted that he was seized of Blackacre in fee simple, when in fact it was copyhold land, and the jury were directed to give damages according to the rate at which the county valued fee simple more than copyhold land.⁴ So where in *Guthrie v. Pugsley*,⁵ the grantors had a life estate in four-sixths of the premises, and a fee in the remainder, it was held in an action on the covenant for seizin that the damages should be measured by deducting the value of the life estate from four-sixths of the purchase money, and without interest, as there was no one to call upon the plaintiff for the mesne

¹ It was, however, decided in that case, that the plaintiff was entitled, under the circumstances, to recover upon his covenant of warranty, after events had happened which would entitle him to actual damages, and the decision was based upon the different character of the two covenants.

² *Harris v. Newell*, 8 Mass. 263.

³ *Noy*, 142. In the report of this case in *Noy*, it has been erroneously printed, "held the covenant was *not* broken:" but the context sufficiently shows this to be a mistake.

⁴ See *Wace v. Bickerton*, 19 Lond. Law Journ. 254.

⁵ 12 Johns. 126.

profits. So¹ where a tenant for life having conveyed with covenant for seizin in fee, the purchaser was held entitled to recover the consideration money, deducting therefrom the value of the life estate, and without interest for the same reason as in *Guthrie v. Pugsley*. The same principle was recognized or applied in many other cases.²

It naturally follows that upon a failure of title in a specific part of the subject of the sale, either party may, for the purpose of affecting the damages, produce evidence to show the relative value which that part bears to the whole, and this, as was said by Kent, C. J., in *Morris v. Phelps*,³ operates with equal justice as to all the parties to a conveyance. "Suppose," said that learned Judge, "a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for ten thousand dollars, and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages, under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated, and the whole value of the purchase had failed? So on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice, if he was obliged to refund nine-tenths of the consideration money. This

¹ *Tanner v. Livingston*, 12 Wend. 83.

² *Rickert v. Snyder*, 9 Wend. 416; *Ela v. Card*, 2 New Hamp. 175; *Lockwood v. Sturdevant*, 6 Conn. 373; *Hubbard v. Norton*, 10 id. 422; *Bryan v. Smallwood*, 4 Har. and McHenry, 483; *Nyce's Exrs. v. Obertz*, 17 Ohio, 76.

³ 5 Johns. 56.

is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. This doctrine is laid down as an elementary rule in Pothier's treatise on the contract of sale. (*Traite du contrat du vente*, No. 99, 139, 142.) He says that an eviction of part of the thing sold, not only gives an action on the warranty, but the purchaser will recover a proportion of the price paid, in a ratio to the amount of the part from which he was evicted; and that if the eviction be of an integral part of the estate sold, as for instance, of a meadow or vineyard belonging to the farm, the damages must be assessed according to a valuation of the price of the meadow or vineyard, and the proportion which it bears to the price of the whole estate. Nothing can be clearer than the equity of this rule."¹

In cases where there are no such special circumstances as those referred to in *Morris v. Phelps*, it seems that the measure of compensation for a failure of title to a part of the purchase is the average and not the relative value.²

In this case of *Morris v. Phelps*, another question arose of considerable importance. It was urged for the plaintiff that if he were restricted from recovering more than the consideration money, he ought not to recover less; that he had a right to full damages

¹ *Dickens v. Sheppard*, 3 Murphy, 526; *Leland v. Stone*, 10 Mass. 463. *Cornell v. Jackson*, 3 Cushing, 509. In Pennsylvania this doctrine was in *King v. Pyle*, 8 S. & R. 166, limited to a case where fraud had been practiced, Ch. J. Tilghman saying, "I give no opinion whether in case of a *fair sale*, and in an eviction of a small part, the measure of damages should be the average price agreed to be paid for the whole tract. I will only say that I do not consider that point as settled."

² *Nelson v. Matthews*, 2 Hen. and Munf. 164; *Nelson v. Carrington*, 4 Munf. 332; *Morris v. Phelps*, 5 Johns. 57; *Backus v. McCoy*, 3 Ohio, 222.

for the whole land, and ought not to be compelled to accept a good title as to part, where there was no title to the other part,¹ for the very part which was lost might have been the principal inducement to the purchase; in other words, that the purchaser had a right under such circumstances to use the machinery of an action on the covenant for seizin in order to rescind the sale. But Kent, Ch. J., held that in the first place the plaintiff had never offered to rescind the sale, nor if he had, did he conceive that it would have availed him in a court of law, since the contract was executed and part of the consideration fulfilled.² But it was said that, apart from this, there was nothing in the case to authorize the plaintiff to go for the whole consideration because the title to part failed. That fact alone did not rescind the sale after the deed was delivered and the consideration paid. The plaintiff was entitled to recover damages only in proportion to the extent of the defect of title. "This is an old and well settled rule of damages; thus in the case of *Beauchamp v. Damory*,³ it was held by Hill, J., that if one be bound to warranty, he warrants the entirety, but he shall not render in value but for that which was lost. In 13 E. IV. 3, (and which case is cited in *Bustard's case*,) the same principle was admitted, and it was declared and agreed to by the Court, that in exchange, where a want of title existed as to part, the party evicted might enter as for a condition broken, if he chose; but if he sued to recover in value, he should recover only according to the value of the part lost. Though the condition be entire and extends to all, yet it was said that the

¹ *Farrer v. Nightingale*, 2 Esp. 639.

² See Chap. XIII.

³ Year Book, 29 Ed. III. 4.

warranty upon the exchange might severally extend to part. So in the case of *Gray v. Briscoe*,¹ B. covenanted that he was seized of Blackacre in fee, whereas in truth it was copyhold land, in fee, according to the custom; and the Court said that the jury should give damages according to the difference in value between fee simple land and copyhold land. There is then no law or reason why the plaintiff should recover more than one-sixth of the consideration money and interest, for the two tracts mentioned in the first count, and five-sixths of the consideration money and interest for the tract contained in the second count."

But while on the one hand a purchaser cannot in a court of law elect to consider the contract rescinded, and recover his whole consideration money where the failure is but partial, so on the other the vendor cannot compel him to accept a perfect title in lieu of proceeding with his action on the covenant. The purchaser's right to recover damages is one of which he cannot be deprived by the vendor's tendering him a perfect title, either before or after suit brought. If, indeed, the purchaser had himself acquired such title, whether by lapse of time,² by estoppel,³ by purchase,⁴ or otherwise, he would be entitled in the one case to nominal damages,⁵ and in the other to what he had paid to purchase in the paramount title.⁶ But the vendor has no right either in a court of law or equity to insist that the purchaser shall accept such title.

¹ Noy, 142.

² *Somerville v. Hamilton*, 4 Wheat. 230.

³ *Baxter v. Bradbury*, 20 Maine, 260; *Cornell v. Jackson*, 3 Cushing, 510.

⁴ But the fact of the covenantee having refused to purchase the paramount title, though offered at a reasonable price, is no bar to his recovery, nor will it, it seems, mitigate the damages. *Miller v. Halsey*, 2 Green. 51.

⁵ *McCarty v. Legget*, 3 Hill, 134.

⁶ See page 92, and Chapter IV.

In a recent case, in New York,¹ the purchaser refused to receive a valid title, which his vendors tendered to him, together with the costs of an action which he had instituted for a breach of his covenants. The vendors having filed a bill to compel him to accept this title, it was dismissed by Sandford, Vice Ch., who said, "The complainants do not ask the Court to compel a specific performance of an open agreement. They ask to compel the defendant to give up his claims under a deed executed seven years before the bill was filed.

"The executed contract was that the complainants were seized of the lots, and if they were not, that they should repay the consideration money. This is sought to be reconsidered and turned into a contract by which, if it should ever turn out that they were not seized, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there were a semblance of mutuality about it, so that the defendants might have coerced them to procure a good title on discovering the defect. But there is no pretence that the defendant had any such equity. The complainant's ground amounts to this; if the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore to him the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him and retain the price which

¹ Tucker v. Clarke, 2 Sandford's Ch. R. 96.

he paid. There is no equity or fairness in this, and the Court cannot grant the relief prayed by the bill, without first making such a contract for the parties ; a contract which they never did make, and I presume never would have made, if any failure of title had been supposed probable when the conveyance was executed." This case is distinguishable from *Baxter v. Bradbury*,¹ on the ground that in that case the perfect title had actually enured to and become vested in the purchaser by virtue of the covenant of warranty, according to the application in the northern States of the doctrine of estoppel. This doctrine is held not to apply to covenants for seizin.²

Interest upon the amount of the consideration money is allowed to the plaintiff as part of his damages in order to counterbalance the claim for mesne profits which the owner of the paramount title may recover.³ Every endeavor is however made by the courts to limit the recovery of interest within the bounds of a recovery of the mesne profits by the true owner.⁴ Thus if a statute of limitations prevent a recovery of these for more than a certain number of years back, interest will be allowed for no longer time;⁵ and although it has been denied that any such limitation of the allowance of interest had ever been sanctioned in Massachusetts, yet in *Whiting v. Dewey*,⁶ it was suggested by the Court, and acquiesced in by the counsel, that the equitable rule of damages

¹ 20 Maine, 260.

² See Chapter IX.

³ *Staats v. Ten Eyck*, 3 Caines, 111; *Sumner v. Williams*, 8 Mass. 222.

⁴ *Guthrie v. Pugsley*, 12 Johns. 126; *Patterson v. Stewart*, 6 Watts and Serg. 528.

⁵ *Caulkins v. Harris*, 9 Johns. 324; *Bennet v. Jenkins*, 13 Johns. 50; *Clark v. Parr*, 14 Ohio, 118.

⁶ 15 Pick. 433.

would be to allow the plaintiff to recover the purchase money so far as there was no seizin, with interest, deducting the profits received by him for which he was not responsible to the other tenants in common.¹ In a recent case,² the plaintiff had been obliged about seventeen years after his purchase to buy in an outstanding paramount title, and the Court held that he was entitled to recover the amount paid by him to perfect the title, with interest from the time of this payment. In opposition to the claim for interest, the defendant urged that during no time had the plaintiff actually received any rents or profits from the premises, but the Court said that whether the vendee turned his purchase to a profit or a loss was no concern of the vendor, since "if a person purchase real estate it is to be presumed that he does

¹ In *Patterson v. Stewart*, 6 Watts and Serg. 527, the statute of limitations does not appear to have been applied. The plaintiff in that case had in 1817 purchased a lot which was subject to an incumbrance, under which it was sold in 1822. No possession was however taken by the sheriff's vendee till 1831. In an action on the covenant against incumbrances implied by the words "grant, bargain and sell," and on the covenant of warranty, the plaintiff contended that the former covenant being broken as soon as made, he was entitled to interest from the year 1817, while the defendant urged that he should be responsible from the year 1831, when possession was taken. The Court, however, properly decided that neither of these positions were correct. "The incumbrance," said Grier J., (before whom the case was tried, and whose opinion was affirmed on error,) "did not divest the plaintiff of the possession or title to the property until final judgment was obtained, and the property levied on and sold by the sheriff. Previous to that time the damage was merely nominal, at least, if there was any actual damage, it is not laid in the declaration nor proved. But when the sheriff's deed was made, the title was absolutely divested, and the damage no longer contingent. The plaintiff was not bound to incur the expense of an ejectment, and might justly abandon all claim to the property. From that time then (1822) he is entitled to interest on his purchase money." Apart from the non application of the statute of limitations, this decision is perfectly sound, and the statute may not have been pleaded.

² *Spring v. Chase*, 22 Maine, 502.

so because its rents and profits will be equivalent to the interest of the money he may be content to pay for it." This case, it will be observed, so far from impugning the rule already mentioned with respect to interest, which at first sight it might appear to do, is in strict accordance with it, since the plaintiff was allowed no interest before the time when he bought in the outstanding title, because in so doing he left no one who could claim the mesne profits, he having purchased the whole title, while he was allowed interest from that time, because that might be presumed equal to the rents and profits he had a right from thence to expect.

In *Anderson v. Arrowsmith*,¹ where a vendor had on the sale of a life estate given a covenant for quiet enjoyment, and a bond of indemnity with sureties against all costs and claims, and the plaintiffs averred that they had been obliged to pay a prior annuity charged upon the land, and which gave the holder a right to enter for non-payment, and claimed to receive back the amount with interest for some years, it was left to the jury to say whether they had not been guilty of negligence in not proceeding against the sureties until after they had become insolvent, and the jury having found that they might have recovered from the sureties, the interest was not allowed, Denman, Ch. J., saying, "if promptly obtained from the surety, and promptly repaid out of defendant's estate, no interest might have become due at all, and we cannot say that would not have been the most gainful course for the defendant."

It is evident, however, that so far as this allowance

¹ 2 Perry & Dav. 408.

of interest is concerned, the plaintiff must recover from his covenantor a certain compensation for a loss which has not yet actually happened, except in the single case where the paramount owner has, prior to the suit upon the covenant, actually recovered the mesne profits from the covenantee. Mr. Sedgwick has remarked as to this in his Treatise on the measure of damages, that "it may still be doubted whether interest should be allowed in any case where the property has been enjoyed by the grantee, unless he has actually been compelled to pay the mesne profits. Interest is given to counterbalance the claim of the true owner for mesne profits, but even after eviction the loss of the mesne profits does not necessarily follow, and as we have heretofore seen the law does not give actual compensation for probable loss."¹ If, however, no allowance were at that time made for the interest, it would then become a question whether upon a subsequent recovery of the mesne profits the covenantee could sustain another action to recover interest.²

¹ Sedgwick on the Measure of Damages, page 175, note.

² Upon this subject of the recovery of interest, the following remarks were made by Underwood, J., in *Combs v. Tarlton's Adminr.*, 2 Dana, 467.

"Where the profits of the land in possession of the vendee, is of more value than the interest of the money enjoyed by the vendor, it is utterly unjust to allow the vendee to recover the purchase money with its interest, and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim, and becomes responsible to the evictor for the mesne profits, then he ought to recover interest from his vendor for as many years as he is or may be required to account to the evictor for the profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits greatly exceed the interest of the purchase money, manifest injustice would result from permitting the vendee to recover interest, and likewise to keep the profits. The principle upon which all contracts ought to be rescinded is, that the parties should be placed as nearly as possible in *statu quo*. If the contract between vendor and vendee is set aside by the chancellor, he would never give interest to the

It not unfrequently happens that a vendee is reluctant to abandon his purchase to an adverse claimant without a struggle, and this unwillingness will, of course, increase in proportion as the value of

vendee, and allow him also to keep the profits. On the contrary, he would say to the vendee, as you have enjoyed all you contracted for, and as the profits of the land are as valuable, or more so, than the interest on the purchase money, you shall not have both; but if you require a restoration of purchase money and interest, you must restore, on your part, the land and its profits; but, as by the contract, you and the vendor regarded the land and purchase money equivalent to each other, I (the chancellor) will regard the use of each as of the same value, and take no account between you for interest or profits. This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit, and cannot be made to yield any, without improving it by the expenditure of money or labor, or both, then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase money with its interest should be restored by the vendor. In such a case, the vendee generally regards the prospect of a rise or appreciation in the price of the land, as the equivalent or consideration which he receives for the interest on the purchase money, and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and receiving no esplees, or profits, the land not being in a condition to yield any, justice would require the restoration of purchase money, with interest, upon a rescission of the contract. The cases first decided by this court, were, in all probability, of this description.

Whether the rules which would govern in chancery, can be applied with safety to a trial at law, has been a subject of much consideration with the court. The rules of right ought to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession, to allow them to be considered and settled by the jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land, for waste and damage; and against these claims, the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the chancellor is more competent to administer justice, than the common-law judge aided by the hasty inquiry of a jury. We shall therefore leave the rule at law to stand as we found it, and as recognized by the case of *Cox's heirs v. Strode*, 2 Bibb, 273. The vendee is entitled to his judgment at law for the amount of

the property has been enhanced while in his possession; hence we must inquire how far a purchaser may, in his action of covenant against his vendor, recover damages for the expense to which he has been put in defending the grantor's title. The rule is well settled to this extent: that as it would be expecting too much of a purchaser to decide at his peril on the validity of a title set up in opposition to that which his vendor undertook to convey, the former should be allowed by way of damages, the taxed costs of any action by which he has reasonably sought to maintain or defend that title.¹ Thus in *Smith v. Compton*,² upon a writ of inquiry of damages, the jury included a sum of £550, which the plaintiff had been obliged to pay, by way of compromise to the party claiming under the superior title, and also included the plaintiff's costs, as between attorney and client, of the action brought against him by that party.³ It was urged that, as to the former sum, there should have been a notice to the

the purchase money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and improvements, and for such decree as equity requires." See *Hart v. Baylor*, Hardin's Rep. 399.

¹ It has been held that, as a general principle, "no person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend," *Gillet v. Ripon*, 1 Mood. & Mal. 406; *Short v. Kalloway*, 11 Ad. and Ellis, 28; but this rule is far from having a universal application; *Lewis v. Peake*, 7 Taunt. 153, S. C. 2 Marsh. 431; *Pennell v. Woodburn*, 7 Car. & Payne, 117, *Neale v. Wyllie*, 3 Barn. & Cress. 523, especially with respect to the covenants for title. Mr. Justice Parke remarked in *Smith v. Compton*, 3 Barn. & Adol. 407, "On the strength of the covenant in this case, the covenantee was justified in acting as if he had a good title. If he defended an action, it was the consequence of your covenant."

² 3 Barn. & Adol. 407.

³ The difference between an English and an American bill of costs will of course be remembered by the student.

covenantor, who might, perhaps, have settled the action upon better terms; and that as to the latter, the plaintiff ought only to recover costs between party and party. But Lord Tenterden held, that the only effect of want of notice, would be to let the covenantor in to show that the bargain was an improvident one, which could not be assumed without proof;¹ and as to the costs, the plaintiff was not indemnified unless he received the amount of the costs paid by him to his own attorney. The law as thus held, has been repeatedly applied on both sides of the Atlantic.²

¹ The same principle with respect to notice to the party bound by the covenant was distinctly recognized in *Morris v. Rowan*, 2 Harrison, 306, where the Court said that it did not find, after looking at all the authorities, that the question whether costs should be allowed as damages had ever been made to depend on the fact of notice by the covenantor to the covenantor of the suit by which the former was evicted. "If notice of the suit had been given to these defendants, and they had either declined to interfere, or had unsuccessfully aided the plaintiff in his defence, it must be admitted that they would not only have been liable for the costs, but would also have been concluded by the judgment of eviction. But suppose the defendant, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defence, he must do it at his own risk and expense; would that have availed them any thing? I think not. It would place a grantee in hazardous circumstances, if upon such an intimation from his grantor, he must either defend at his own expense or abandon the title, and look for compensation in damages under his covenants. On the contrary, I am of opinion that notwithstanding such notice from the covenantor, the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." In *Swett v. Patrick*, 3 Fairf. 10, it seems to have been thought by the Court that as the covenantor had been notified, the costs were *therefore* recoverable, but the cases generally do not recognize this distinction, and as it is well settled that the absence of notice does not preclude the recovery of damages upon the covenant, but only increases the burden of proof on the covenantor, (*supra*, p. 208,) it would seem equally to follow that the absence of notice should not preclude the recovery of costs.

² *Pomero v. Partington*, 3 Term, 678, (by a note in that case the costs of an ejectment seem to have been included as a matter of course,) *Neale v.*

It has also been held in many cases, that in addition to these taxed costs, the plaintiff should be entitled to recover his counsel fees and other expenses. Thus in an early case in New York,¹ it was held that in costs, were included reasonable fees of counsel, as well as those which were taxable. So in a later case,² where the plaintiff had been evicted under a judgment in an action, which he had defended, brought under the paramount title, it was said by Mr. Chief Justice Savage, "The taxed costs included in the record were certainly proper, if the record itself was properly admitted. The costs of the defence and of counsel fees, were also proper, if the plaintiff's declaration was sufficient to admit them. The plaintiff in his declaration claims damages,³ and surely should be permitted to prove those damages.

The principle on which these cases are based has been recognized by many others.⁴ In *Leffingwell v.*

Wyllie, 3 Barn. & Cress. 533; *Sumner v. Williams*, 8 Mass. 162; *Tufts v. Adams*, 8 Pick. 550, (where the costs were incurred by the covenantor as plaintiff in consequence of the representations of the covenantee;) *Harding v. Nelson*, 27 Maine, 525; *Haynes v. Stevens*, 11 New Hampshire, 28; *Pitkins v. Leavitt*, 13 Verm. 379; *Staats v. Ten Eyck*, 3 Caines, 115, (where, however, it was said that the costs of defending the action for mesne profits were not recoverable, as the covenantor was not bound to defend that suit, see *supra*, p. 97,) *Pitcher v. Livingston*, 4 Johns. 1; *Waldo v. Long*, 7 id. 174; *Burnet v. Jenkins*, 13 id. 51; *Rickert v. Snyder*, 9 Wend. 423; *Stewart v. Drake*, 4 Halst. 141; *Holmes v. Sinickson*, 3 Green, 113; *Cox's heirs v. Strobe's heirs*, 2 Bibb, 273. Some of these cases were actions upon the other covenants for title, but the principle is the same as in suing on the covenant for seizin.

¹ *Staats v. Ten Eyck*, 3 Caines, 115.

² *Rickert v. Snyder*, 9 Wend. 423.

³ A new trial was ordered in this case, and it is presumed that the recovery of those expenses was to depend in that trial upon whether the declaration averred this special damage, as in *Neale v. Wyllie*, 3 Barn. & Cress. 535.

⁴ *Neale v. Wyllie*, 3 Barn. & Cress. 535; *Sumner v. Williams*, 8 Mass. 162; *Hardy v. Nelson*, 27 Maine, 525; *Haynes v. Stevens*, 11 New Hampshire, 28; *Pitkins v. Leavitt*, 13 Verm. 379.

Elliott,¹ however, the recovery of counsel fees was denied, while other expenses were liberally allowed for. There had been no adverse suit brought, but the covenantors had yielded to a paramount right of entry, and afterwards purchased the adverse title. On the question of damages, the Court held that if the plaintiffs extinguished the paramount title for a nominal sum they were entitled to recover no more of the defendant. If they were put to trouble and expense in procuring the extinguishment, that was a proper ground of damages. The auditor to whom it was referred to estimate these, classified the plaintiff's claims under three heads; first, (besides the amounts paid to extinguish adverse titles, with interest from their payment,) charges for the plaintiff's time while thus employed, for horses, carriages, board, and counsel fees, with interest on each from the service of the writ in the action on the covenant; secondly, similar charges subsequent to the service of the writ, not, however, including counsel fees; and thirdly, expenses of preparing for trial, attendance at court, and counsel fees since the commencement of the suit. The Court on the argument of exceptions to this report,² held, that the plaintiffs were entitled to recover in full the sums reported in the first and second classes of claims, except the sums paid to counsel, and that in the third class the counsel fees should be disallowed, and the other charges placed upon the same ground in that as in other actions, trespass for example, and the fees of the auditor were allowed in the costs.

In New Jersey it seems to have been held, on the

¹ 8 Pick. 457.

² 10 Pick. 204.

authority of an expression of Mr. Chancellor Kent in his Commentaries,¹ to the effect that a covenantor "could recover the consideration money with interest and costs, and *no more*," that counsel fees, other than those taxable in the bill of costs, were not recoverable,² but the expression in question seems by the context to have referred to the rule as settled in most of the States, that upon none of the covenants for title could the damages be increased by reason of improvements or a rise in value of the land,³ and not to have referred to the question of counsel fees, or other expenses.

It must not, however, be supposed that the right to recover counsel fees expended by the purchaser in the action by which he has sought to maintain the title received from his vendor can be extended so as to embrace those incurred in suing the latter upon his covenants for title.⁴

¹ 4 Commentaries, 477.

² *Holmes v. Sinnickson*, 3 Green's S. C. R., 313; in *Morris v. Rowan*, 2 Harrison, 306, cited, *supra*, p. 97, this decision was referred to without dissent.

³ See as to this subject, *infra*, p. 68 *et seq.*, 264 *et seq.*

⁴ Even the right to recover costs in the latter case rests purely upon statutory enactment. It will be remembered that until the statute of Gloucester, (6 Ed. I. c. 1,) no costs whatever were allowed in any action. That statute provided that the demandant might recover against the tenant the costs of his writ purchased. These words, however restricted, were held to extend to all the legal costs of the suit, but not to the costs and expenses of the plaintiff's travel and loss of time; 2 Inst. 288. Since then, whenever damages are recovered in cases arising *ex contractu*, in which is no element of fraud, willful negligence or malice, they have been limited to the plaintiff's direct pecuniary loss, and the legal costs of the suit brought to enforce his demand. In some cases of tort, the rule is more enlarged, and fluctuates with the tide of conflicting cases. See Sedgwick on Damages, ch. 111; Cushing's Domat, 769; *Good v. Mylin*, 8 Barr, 56.

CHAPTER III.

THE COVENANT FOR GOOD RIGHT TO CONVEY.

THIS covenant is very generally said to be synonymous with that which has just been considered. But, as has been before remarked, although the existence of an estate in fee simple necessarily implies a power of transferring it, so that a covenant for good right to convey seems useless when preceded by a covenant that the vendor is seized of an indefeasible estate in fee simple; yet the converse of the proposition is by no means universally true, the cases being numerous in which the subject of the purchase is transferred by virtue of a power, although the vendor may not be seized of an estate. Where such is the case, the covenant for seizin is omitted, and in its place substituted a covenant that the power is a valid and subsisting one, and has not been exercised or extinguished.¹ But in English conveyancing it is quite common to find, in the same conveyance, both the covenant for seizin and for good right to convey. This practice may have arisen (though this is a mere suggestion) from the fact, that it was usual in England for conveyancers, for the purposes of barring dower and escaping the expense and trouble of passing the wife's estate by suffering a fine, to limit estates to such uses as the

¹ 2 Sugden on Vendors, 510. Dart on Vendors 259.

purchaser should appoint, and for want of appointment, to himself in fee.¹ Here the fee was, until appointment made, vested in the purchaser and his heirs as a qualified and determinable fee, to yield, however, to the estate which would arise and vest in the appointee by virtue of the power. In such case, there would seem to be room for the operation of both covenants.

But especially in some parts of this country would there appear to be reason for the insertion of the covenant now under consideration. It has been remarked in the preceding chapter,² that in many States the covenant for seizin is answered by the transfer to the purchaser of an actual though a tortious seizin, irrespective of the right by which the property is held, and where the covenant for seizin is thus limited in its application to the mere transfer of the seizin in its narrowest signification, there would seem every reason why a

¹ It was held by Chief Justice Eyre, in *Goodill v. Brigham*, 1 Bos. & Pull. 192, that a power was inconsistent with an estate in fee simple, the latter being of so high a nature as to merge and render void any power which might be intended to accompany it, and this was adopted by Sir William Grant, when Master of the Rolls, in the case of *Maundrell v. Maundrell*. But on the argument of that case before Lord Eldon (10 Vez. 264,) he stated that the case of *Goodill v. Brigham* "was not the law," that it had always surprised him, and was contrary to the experience of practical conveyancers, who were in the constant habit of so limiting estates on their transfer to a purchaser, for the purpose of barring the dower of the wife of the purchaser when he in turn should wish to dispose of it, without the troublesome and expensive process of levying a fine.

I had thought it probable that this method of conveyancing was now less used, since a recent statute (3 & 4 Will. IV. c. 105) gives to the wife a right of dower only in the lands of which her husband *died* seized, and not in those sold by him in his life time; but according to a very recent author, "it is still the general practice, even where the purchaser has no wife to whom he was married before the late dower act came into operation, in order to avoid the necessity, on future sales, of proving the non-existence of any such wife" *Dart on Vendors*, 257. But with the lapse of time this practice will obviously fall into disuse.

² See page 48, etc.

purchaser should protect himself by a covenant which refers exclusively to the right, or, as it is popularly called, the title. For although a covenant of warranty or for quiet enjoyment might protect him, when the subject of the purchase should be taken from him, yet there are many instances in which a recovery would be sanctioned upon the covenant for good right to convey, when it would be denied under these other covenants. But it is somewhat remarkable, that in the very case where the covenant for good right to convey would thus seem not to be merely synonymous with the covenant for seizin, and thus superfluous, it should have been held to have no greater or other scope.

But the reason for this course of decision has, in the previous chapter, been attempted to be shown to have arisen from the covenants for seizin and for good right to convey, being considered as assurances to the purchaser that the vendor had such a present seizin as would enable him, without violating the champerty acts, to transfer the estate, and consequently a good right to convey it under those acts. It has, indeed, been held in an old case, that the latter covenant related to the capacity of the grantor to convey, so that where a husband and wife, seized in right of the wife, conveyed to a purchaser with a covenant on the part of the husband, that they had good right to assure the lands, the incapacity of the wife to convey by reason of her infancy, was held to be a manifest breach.¹ But it is equally clear that it was considered also as relating to the title; and where the covenant is construed according to the natural inter-

¹ *Nash v. Ashton*, *Skinner* 42, S. C., *T. Jones*, 195.

pretation of its words, it must be broken by the absence in the vendor of the right to the premises—the *jus*, as distinguished from the *seizina*.

When expressed at length its form is usually in these words: “And also that the said (grantor) now hath in himself good right, full power, and lawful and absolute authority, by these presents, to grant, release or confirm the said messuage, &c., hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with the appurtenances, unto and to the use of the said (purchaser,) his heirs, appointees, and assigns, for ever, and according to the true intent and meaning of these presents.”

Much of what has been said in the preceding chapter as to the peculiarities of the covenant for seizin, apply equally to that for right to convey. Both, according to the weight of American authority, are held to be broken as soon as made, and therefore incapable of being taken advantage of by an heir or an assignee.¹ Both are governed by the same rules as to the pleadings²; and the measure of damages is the same as to both.³

¹ Chapman v. Holmes, 5 Halstead, 40. See Chapter VIII.

² Jenkins 305, pl. 79.

³ Bickford v. Page, 2 Mass. 455; Dunnica v. Sharp, 7 Miss. 71.

CHAPTER IV.

THE COVENANT AGAINST INCUMBRANCES.

THE difference that exists between the covenants for title, as expressed in England and on this side of the Atlantic, is strikingly shown with respect to this covenant. There, it is almost invariably inserted after the covenant for quiet enjoyment, to which it may almost be said to be a kind of supplement. After it has been set forth that the grantee shall quietly enjoy, &c., the conveyance goes on to say, "And that (that is, the peaceable enjoyment) free and clear, and freely, clearly and absolutely acquitted, exonerated, released and discharged, or otherwise by him the said (vendor) his heirs, executors or administrators, at his and their own costs and charges, in all things well and sufficiently protected, defended, saved harmless, and kept indemnified, of, from, and against, all and all manner of former and other gifts, grants, feoffments, leases, mortgages, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, entails, annuities, legacies, rents, arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the King's majesty or any of his predecessors, sequestrations, estates, titles,

troubles, liens, charges and incumbrances whatsoever.”¹

A sentence thus commencing with the words “and that free,” &c. necessarily depends for its construction upon the preceding sentence or clause to which it is intended to relate, or of which it forms a part. When, therefore, this prior sentence consists of the covenant that the grantee, “shall peaceably enjoy” the premises (a covenant evidently prospective in its operation,) it would seem that the covenant against incumbrances being closely connected with it was equally prospective, and that its breach must therefore be made to depend, not upon the mere fact of existing incumbrances at the time of the execution of the conveyance, but on the disturbance or damage which the incumbrance might hereafter cause.²

¹ A number of forms of this covenant will be found in 3 Wood’s Conveyancing, by Powell. That in the text has been taken from Platt on Covenants, 330. In the statute 8 and 9 Victoria, c. 119, by which it is designed, by the use of short forms, to abridge the length to which covenants for title have spread, the covenant as implied by the statutory expression, “free from all incumbrance,” is thus set forth:—

“And that free and clear, and freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise, by the said covenantor, or his heirs well and sufficiently saved, kept harmless and indemnified of, from and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble, and incumbrance whatsoever, made, executed, occasioned, or suffered by the said covenantor or his heirs or any person claiming or to claim, by, from, under or in trust for him, them or any of them.” Any apt words, however, tending to show the meaning of the party using them, will in general be held sufficient, and be interpreted most strongly against him. Thus a covenant that the defendant was seized of an indefeasible estate in fee simple, “without any manner of condition to alter, charge, determine, or defeat the same,” was held in *Stannard v. Eldridge*, 16 Johns. 256, to be in substance and effect a covenant against incumbrances.

² A distinction to this effect was noticed by Lord Cowper, in *Vane v. Lord Barnard*, Gillert’s Eq. R. 7, where he observed there was a difference between a covenant that the estate was free from incumbrance, and a cove-

Such a distinction is of less consequence in England than in this country. There the covenant for seizin and against incumbrances are capable of being taken advantage of by the heir, the devisee, or the assignee of the estate whose title they assure, in the same manner as the covenant for quiet enjoyment. Here, in nearly every State, the covenant for seizin, if broken at all, is held to be broken as soon as it is made; and although doubts have at times been expressed as to whether this technical rule applied to the covenant against incumbrances, which it has been said partakes more of the character of a covenant of indemnity, yet the general current of American authority holds it to be, equally with the covenant for seizin, a covenant *in presenti*, and broken as soon as made.¹ Hence, whenever introduced in this country, thus coupled with the covenant for quiet enjoyment, it may be taken out of this severity of rule, and being thus made prospective in its operation, its benefits may enure to the party in whose time the actual loss has happened.

But as in America the covenant against incumbrances almost always stands by itself as a separate and independent covenant, (generally expressed in the short form, "and that the premises are free and clear of all incumbrance,") it has been thought more proper to consider it next in order to the covenants for seizin and good right to convey, to which it is here more analogous than to the covenant for quiet enjoyment or of warranty.

nant that the party should enjoy free from incumbrances. In the latter case, the covenant is not even technically broken, so long as undisturbed possession is enjoyed, or the covenantor not actually damaged, notwithstanding incumbrances might exist. *Nyce's Exr. v. Obertz*, 17 Ohio, 71; *Grice v. Scarborough*, 2 Spears, 652; *Van Slyck v. Kimbal*, 8 Johns. 198.

¹ See Chapter VIII.

When the covenant against incumbrances is not to be a general one, that is, when it is limited to the acts or omissions of the covenantor, it is here generally expressed in the short form that the premises are "free and clear of all incumbrance done or suffered by the said" grantor. In England the language is more precise; and after the form given on the preceding page is added, "at any time heretofore, and to be from time to time hereafter had, made, done, committed or suffered by the said (grantor,) or his heirs or any person or persons rightfully claiming, or to claim by, from or under him, them or any of them, or by or with his or their acts, means, consent, default, privity or procurement."¹ The same expression is substantially used in limiting the covenant for quiet enjoyment. These concluding words, "acts, means, consent, default, privity and procurement," have in England received certain constructions which are particularly referred to in the next chapter, where they more properly belong.

The full form in which the covenant is thus expressed in England has necessarily precluded many questions which would otherwise arise as to its scope, and which have, in this country, where its expression is so terse, presented themselves.

¹ The usual and only covenant into which a mere trustee can in strictness be compelled to enter, is that he has done no act to incumber the estate, (see Chap. XI.) and is generally thus expressed: "that he the said (trustee) hath not at any time heretofore made, done, permitted or suffered, or been party or privy to any act, manner or thing whatsoever, wherewith or by means whereof the premises hereby granted, or any part or parcel thereof, now or at any time hereafter shall be impeached, charged, or incumbered in title, estate, or otherwise howsoever." The importance of the expression being "party or privy to," which is not necessarily implied by the words, "permitted or suffered," is exemplified by the case of *Hobson v. Middleton*, 6 Barn. & Cress. 295. See 2 Sugden on Vendors, 519.

One of the most prominent of these is whether an inchoate right of dower is an incumbrance within the meaning of the covenant. In the case of *Duval v. Craig*,¹ it was expressly inserted in the body of the covenant, and the case therefore presented no difficulty. The question was whether the covenant was joint or several, and Story, J., merely observed, "Some of the incumbrances within the contemplation of the parties are not of a nature to be jointly created, as for instance, the incumbrance of dower and right of dower."

But in the previous case of *Powell and Wife v. The Monson and Brimfield Manufacturing Co.*,² the same distinguished Judge had more difficulty. The case was one of a bill filed by husband and wife for an assignment of dower in lands which had been previously conveyed to the defendants by a former husband of the wife, with a covenant against incumbrances. In this conveyance she had not joined. It seems to have been contended by the defendants, that the covenant against incumbrances implied a contract on the part of the husband to procure the wife to release her dower, and that this must raise a presumption that the deed actually conveyed that right. It was properly observed by the learned Judge, that "it would be dangerous to bolster up imperfect instruments in this way, by conjectures and inferences;" but it was further said, "I am not prepared to admit the doctrine contended for at the bar, that the covenant against incumbrances is broken by the mere existence of a possible incumbrance. . . A possibility of dower is not, within the meaning of the covenant, an

¹ 2 Wheaton, 45.

² 3 Mason, 355.

incumbrance, for that means a settled, fixed incumbrance; and if the result of the Massachusetts authorities on this point has not been mistaken by me, they do not sustain the doctrine now contended for."¹

But whatever authority might be supposed to have been derived from this case, and those on which it was founded, it was shortly after distinctly held,² that "every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. Of this nature is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one-third out of it." In a subsequent case,³ it was remarked by Shaw, Ch. J., "Whether, under all circumstances, an inchoate right of dower, where husband and wife are both living, shall be deemed an incumbrance, is a question which must depend upon the contract and the circumstances. It is true that it is no estate or interest, but only a

¹ The authorities to which reference is thus made (the cases being cited in the margin) do not, however, fully bear out this conclusion. In *Marston v. Hobbs*, 2 Mass. 433, it was merely said by Parsons, Ch. J., "The defendant did not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants the breaches should be specially assigned, showing the nature of the incumbrance and interruption complained of. No express case has been produced as to covenants for quiet enjoyment: and in the entries the incumbrance is specially alleged in the count;" while in *Bickford v. Page*, 2 Mass. 461, which was an action brought on covenants of good right to sell, against incumbrances, and of warranty against all lawful claims, with a general assignment of each breach by negating the words of the covenant, the same learned Judge observes, "The covenant against incumbrances, and to warrant and defend, we lay out of the case; as no particular incumbrance is shown, and no ouster by a title paramount is alleged, the plaintiff cannot recover damages for any supposed breach of these covenants."

² *Prescott v. Truman*, 4 Mass. 629.

³ *Fuller v. Wright*, 18 Pick. 405.

possibility. But it is a possibility which may give the wife an estate, upon the happening of a contingent event, the death of her husband, without any new act to be done or new right to be acquired. . . .

We think no general rule can be laid down, to determine absolutely whether such an inchoate right of dower is an incumbrance; it must depend upon many and various circumstances and considerations."

In a more recent case,¹ however, it was unqualifiedly held, that an inchoate or contingent right of dower was an existing incumbrance, amounting to a breach of the covenant, which "extended to all adverse claims and liens on the estate conveyed, whereby the same may be defeated in whole or in part, whether the claims or liens be uncertain or contingent, or otherwise. The beneficial interest which a mortgagee has in an estate mortgaged for the purpose of securing him against future liabilities or for future advances, is uncertain and contingent, but such a mortgage is undoubtedly an incumbrance;" and the law has been held the same way in many other cases.²

In a recent case in Ohio, however, a contrary view was taken.³ It was averred as a breach of a general covenant against incumbrances, that the widow of a prior owner of the premises had, after her husband's

¹ *Shearman v. Ranger*, 22 Pick. 447.

² *Porter v. Noyes*, 2 Greenl. 26; *Donnel v. Thompson*, 1 Fairf. 170; *Jones v. Gardiner*, 10 Johns. 266; *Bitner v. Brough*, 11 Pa. State Rep. (1 Jones), 137; *Smith v. Ackerman*, 5 Blackf. 542; *Whistler v. Hicks*, id. 100. In *Bitner v. Brough*, however, the action was not on a covenant in a deed of conveyance, but on articles to convey "by a good and sufficient deed, clear of incumbrances," but the principle is the same. "The defendant covenants," said Rogers, J., "to make the title free from all incumbrances, and this is immediately broken, on the refusal of the wife, from whatever cause, to become a party to the conveyance."

³ *Nyce's Executors v. Obertz*, 17 Ohio, 71.

death, filed her petition for dower, which was assigned and valued at a certain sum, which the covenantee was compelled to pay, in order to avoid execution, and then brought suit on his covenant. The Supreme Court took a distinction between the effect of the covenant as expressed in that case, (which was in the short form already referred to, "that the premises are free and clear of all incumbrances whatsoever,") and as expressed in English conveyances, and held that the former was strictly a covenant *in presenti*. "Suppose," said Hitchcock, J., in delivering the opinion of the Court, "by contract, A should bind himself, for a consideration to be paid, to convey to B by deed, containing covenants of warranty and against incumbrances, a tract of land; could B avoid the performance of the contract by showing that by possibility there might be, at some future time, a dower claim like the one in the present case? It seems to me not, but that B would be compelled to take the land and rely upon his covenants. The case would be different, however, should he, after making the contract, discover that the land was incumbered by judgment or mortgage."

Except as to the last sentence, some doubt may be entertained as to the correctness of this reasoning. Equity would not, under the circumstances imagined by the learned Judge, compel a specific performance,¹ nor could damages be recovered at law against the purchaser for a refusal to comply with the contract.² It is one of the most settled principles of the law of

¹ *Greenwood v. Ligon*, 10 Smedes & Marshall, 615; *Barnet v. Gaines*, 8 Alab. 374; *Fuller v. Wright*, 18 Pick. 405.

² *Porter v. Noyes*, 2 Greenl. 26; *Jones v. Gardiner*, 10 Johns. 266; *Bitner v. Brough*, 11 Pennsylvania State Reports, 137.

vendor and purchaser, that, as a general rule, the right of the latter to a title clear of all claims whatsoever, present and future, fixed or contingent, is one of which he cannot be deprived but by his own acts. It is a right, as has been often observed by the greatest Equity Judges, given by the law, and not springing from the contract of the parties. It would be affectation to cite authority as to this. The very point, however, put by the Court in Ohio, was met by Rogers, J., in a recent case:¹ "The covenant was broken by the defendant's refusal to comply with the contract, for the plaintiff was not bound to receive a deed, even with general warranty, unless the wife joined in the conveyance, extinguishing her contingent interest."² The acts of the purchaser may, of course, waive his right, as when, with notice of the right of dower, he pays the purchaser money, and goes into possession; in such case he will not, of course, be allowed to rescind the contract because of such an incumbrance.³

But, in truth, there is far less real than apparent contradiction between the cases upon this subject of dower. All the difficulty that has arisen, if indeed any exists, seems to have been caused by losing sight of the distinction between a technical breach of this covenant, and a breach attended or followed by such circumstances as to give a right to actual damages. Where the covenant is that the purchaser "shall enjoy free from all incumbrance," most unquestionably the covenant is not broken by the mere existence of a right of dower, whether inchoate or otherwise.

¹ *Bitner v. Brough*, 1 Jones, 138.

² See the able remarks of Gibson, Ch. J., in *Clark v. Seirer*, 7 Watts, 110.

³ *Barnet v. Gaines*, 8 Alab. 374.

But where the form of the covenant is *in presenti*,—that the premises “are free of all incumbrance”,—then the covenant is as certainly broken by the existence at that time of a right of dower, although it may be inchoate and contingent; but at the same time, if the purchaser then sue upon the covenant, his damages would be but nominal.¹ The distinction between a verdict for the defendant, and a verdict for the plaintiff with nominal damages, is apparently so slight a one, as easily to account for its having been sometimes lost sight of. It is often of importance, however, particularly on the question of costs. In the same way it has been held,² that a prior lease was clearly an incumbrance within the scope of the covenant, but that if the right to the rent reserved had passed with the reversion, under the statute of Hen. VIII., or a similar enactment, the damages might be but nominal.

There would be little difficulty on this side of the Atlantic in holding that most of the incumbrances specified in the English form, came within the scope of the covenant as generally expressed here. In addition to these, it has been held,³ that where a testator gave to his daughter the right to reside in a part of a house, the whole of which was afterwards sold by the devisee, such paramount right was a breach of the general covenant against incumbrances entered into by the latter.

It was laid down somewhat broadly in the case of *Prescott v. Truman*,⁴ that a breach of the covenant against incumbrances, will be caused by the exist-

¹ *Donnel v. Thompson*, 1 Fairf. 170, and see cases cited *infra*.

² *Grice v. Scarborough*, 2 Speers, 249.

³ *Jarvis v. Buttrick*, 1 Metc. 480.

⁴ 4 Mass. 630.

ence of *any* easement or servitude whatever to which the land is subject.

This is undoubtedly true as a general rule. Thus a breach will be caused by the existence, in a third party, of a right of way, for the purpose of drawing water from a spring,¹ a right to clear an *artificial* water-course,² a right to cut timber, &c.³

But in a recent case in Massachusetts,⁴ a reasonable distinction was taken between a natural and an artificial water course, and it was held that the right of a mill owner to enter upon the land of another, for the purpose of cleaning and removing obstructions to a natural stream, flowing through their respective premises, was not an incumbrance within the true meaning of the covenant. It was said that the right to have a natural stream of water pass off freely over the land of an owner below, could not of itself create any liability for damages by reason of any such covenant. The question then resolved itself into whether this right drew with it, as an incident, the right to enter on the land below, for the purpose of clearing the stream, and this, on familiar principles, was answered in the affirmative, it being a secondary easement, necessary and incidental to the enjoyment of the principal one, though of course to be exercised within the narrowest and strictest limits compatible with that enjoyment.

Some conflict of authority has existed, and still prevails, as to whether the existence of a public road or highway over the property, is a breach of this cove-

¹ Mitchell v. Warner, 5 Connect. 497 ; Harlow v. Thomas, 15 Pick. 68.

² Prescott v. Williams, 5 Metc. 433. ³ Cathcart v. Bowman, 5 Barr, 319.

⁴ Prescott v. Williams.

nant. There can no question, that such a way is no breach of the covenant for seizin, as though the public may have the right of passage, the freehold still remains in the owner of the soil.¹ A private way, (unless perhaps, it be a way of necessity, so as to come within the principle of the case just cited,) might unquestionably be a breach of the covenant against incumbrances; and the same may be said of any way which is not visible and patent, or whose enjoyment is not matter of public notoriety. Nor was any difference recognized at an early day in Massachusetts as to public roads. In *Kellog v. Ingersoll*,² the breach assigned was the existence "of a public town road, a way duly laid out for the use of the town," and it was held with confidence by Parsons, Ch. J., that the road thus described, was an incumbrance on the land sold: "It is a legal obstruction to the purchaser, to exercise that dominion over the land, to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them; but it cannot affect the question, whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid;" and such a doctrine seems generally recognized in the New England States.³

But in New York, though the question was not directly decided in the case of *Whitbeck v. Cook*,⁴

¹ See Chapter II.

² 2 Mass. 101.

³ *Prescott v. Truman*, 4 Mass. 630; *Pritchard v. Atkinson*, 3 New Hamp. 335; *Herrick v. Moore*, 19 Maine, 313; *Hubbard v. Norton*, 10 Connect. 431.

⁴ 15 Johns. 49.

Spencer, J., expressed a strong doubt, if a public road could properly be deemed an incumbrance, while in Pennsylvania, where the question was presented in *Patterson v. Arthurs*,¹ it was decided in the negative. That case, however, was not an action brought on a covenant against incumbrances, but an action by a vendor, for the first instalment of the purchase money of certain lots covenanted to be conveyed clear of all incumbrances, and the purchaser claimed a deduction because of a public road, which had been in use for thirty years, and passed diagonally over the ends of the lots. Kennedy, J., in delivering the opinion of the Court, expressed his astonishment that a highway should ever have been imagined to be an incumbrance within the covenant, and his belief that it had been the universal understanding of both sellers and purchasers in Pennsylvania, that the covenant against incumbrances did not extend to public roads or highways. "Although a public highway," said that learned Judge, "no doubt is, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it, and made himself acquainted with its locality, and the state and condition of it; and consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind, the price that he was willing to give for the land, with a reference to the road, either making the price less or

¹ 9 Watts, 152.

more, as he conceived the road to be injurious or advantageous to the occupation and enjoyment of the land. . . The existence of the highway could not be regarded as an incumbrance that came within the meaning of the parties, when they used the term 'incumbrances' in their contract; and hence an action of covenant could not be sustained on account of it, for a breach of the covenant against incumbrances. It may be, however, that if a person purchase land, without having seen it, upon the representation of the vendor, where its value is materially lessened by a public highway being located upon it, which circumstance is concealed or not made known by the seller to the purchaser, the latter might obtain redress by an action on the case in the nature of a deceit; or, in an action brought against him for the purchase money, might have compensation made, by a deduction therefrom. But it will lie upon him, before he can claim compensation on such account, to remove, by the proof of circumstances at least, the presumption that he knew of the existence of the highway, at the time he bought, and that the seller concealed it from, or did not disclose it to him."¹

This opinion seems to have been in a great degree based upon what was considered to be the general understanding as to this point throughout the State,

¹ A case somewhat similar to this was decided by Lord Rosslyn in 1800, where a meadow having been sold to the owner of an adjoining house, without any notice having been given by the vendor, of a footway round and across it, which lessened its value, the chancellor decreed a specific performance with costs. He "could not help the purchaser who did not choose to inquire. It was not a latent defect:" *Oldfield v. Round*, 5 Ves. 508. Lord Manners subsequently observed of this case in *Elland v. Llandaff*, 1 Ball & Beatty, 250, that he believed the bar were not very well satisfied with this decision, although certainly the purchaser was very negligent—had he used ordinary caution he would have discovered the easement. See Chapter XIII.

and the case of *Kellog v. Ingersoll* was referred to, and supposed to have proceeded upon a general contrary understanding in Massachusetts, although this does not appear in that case or in the others decided in the New England States. But although it is not mentioned in the opinion in *Patterson v. Arthurs*, there may be reasons why such a general understanding should have arisen in Pennsylvania, so far as respects public roads in the country. It was originally agreed by Penn, at the formation of this colony, that there should be laid out "great roads from city to city;" and as the wild state of the country rendered this impossible to be done otherwise than very gradually, it became the custom of the proprietaries, and afterwards of the Commonwealth, to allow to all grantees of vacant lands an addition, in the proportion of six acres for every hundred, as a compensation for the roads that should thereafter be opened. This was so universal, that although the declaration of rights in the constitution provided that no man's property should be taken or applied to public use "without just compensation being made," it was held that an Act of the Legislature authorizing a turnpike company to lay out and open roads, without compensation, was no infringement of the constitution, "such compensation having been originally made in each purchaser's particular grant,"¹ and from this circumstance, and the fact that "it had been considered that the running a road through a man's land conferred such a benefit upon him as fully to compensate him generally for the expense of fencing his land anew," we may perhaps trace the "common

¹ *McClenachan v. Curwin*, 3 Yeates, 373.

understanding" which formed the basis of the decision.

The doctrine of *Patterson v. Arthurs*, seems perfectly correct when applied to the case of a road actually laid out, dedicated to public use as a highway, and opened. In such case there would appear to be as little reason to call it an incumbrance as there would be to call by that name a ledge of rocks, a marsh, or any similar incident to the land which lessened its value. When the road is not thus actually opened, it would seem that no precise and abstract rule can safely be adopted. The mere fact of such a road being sometimes a benefit, and sometimes an injury, apparently forbids such a rule. If it is generally laid down, as in *Kellog v. Ingersoll*, that the road is an incumbrance within the covenant, but that the damage it inflicts is matter of calculation for the jury, the latter are bound to give at least a verdict for nominal damages, thus placing a means of annoyance in the hands of the purchaser, if such a verdict be allowed to carry costs. The better rule in such a case would seem to be, to leave to the jury not merely the question of damages, but also the question of whether the road was or was not an incumbrance.¹ The question of concealment of the existence of such a road, it may be observed, is one which properly has no connection whatever with the covenant, since if the purchaser were actually deceived, the presence or the absence of the covenant would have no effect upon his rights.²

¹ In *Herrick v. Moore*, 19 Maine, 313, the plaintiff was held entitled to recover on the ground that the road though laid out, had not been opened; and he had had no opportunity, it was said, by an examination of the land, to learn that a county road had legally been laid out through it.

² See *infra*, Chapter XIII.

It was observed in the chapter on the covenant for seizin, that in the pleadings on that covenant it was unnecessary for the plaintiff to specify the paramount title, or indeed refer to it in any way, either in the declaration or replication. A different rule, however, prevails with respect to the covenant against incumbrances. It is not sufficient that the plaintiff negative the words of the covenant generally; he takes upon himself the responsibility of proving the incumbrance, and must set it forth in his declaration. A contrary rule would oblige the defendant to prove a negative.¹ It is not, however, necessary, or prudent, either in suing upon this covenant or that for quiet enjoyment or of warranty, that the incumbrance or paramount title should be set forth more than substantially, since if the incumbrance or title were previously alleged, and being so alleged, were traversed, the plaintiff might not have the means of proving it exactly.²

Care, however, should be taken that the damages be specially laid.³ As, according to well settled au-

¹ Comyn's Rep. 228, *Marston v. Hobbs*, 2 Mass. 437; *Bickford v. Page*, id. 461; *De Forest v. Leete*, 16 Johns. 122; *Shelton v. Pease*, 10 Miss. 473.

² 2 Wms. Saunders, 181 a, note 10; *Foster v. Pierson*, 4 Term Rep. 617; *Young v. Raincock*, 7 Com. Bench, 310.

³ 1 Chitty's Plead. 338. The following form is given by Mr. Greenleaf in his *Treatise on Evidence*, vol. 2, § 244. "The declaration by a grantee by deed of bargain and sale, against his grantor, for breach of the covenant of freedom from incumbrance, by the existence of a paramount title, is in this form: ——— in a plea of covenant; for that the said defendant, on the ——— day of ——— by his deed, (if by indenture, it should be so set forth,) duly executed, acknowledged and recorded, and by the plaintiff now here produced in Court, for a valuable consideration therein mentioned, bargained, sold and conveyed to the plaintiff, (here describe the premises) to have and to hold the same with the appurtenances to the plaintiff, and his heirs and assigns forever; and therein among other things, did covenant with the plaintiff that the said premises were then free from all incumbrance whatsoever. Now the plaintiff in fact says that, at the time of making the

thority, it is a general rule that the mere existence of the incumbrance, without more, will entitle the plaintiff to no more than nominal damages, the familiar rule applies, that where damage does not necessarily arise from the act complained of, the plaintiff must, to prevent surprise, state the particular damage sustained, or he will not be permitted to give evidence of it on the trial.

The damage on this covenant may arise in various ways. The purchaser may be obliged to extinguish the incumbrance, or he may be evicted under it, or the land may be sold under a subsequent incumbrance, when, if the amount of the former one be paid out of the proceeds of sale, it will, by so much, diminish the amount coming to the plaintiff.

In *Funk v. Voneida*,¹ when the fact of the existence

said deed, the premises aforesaid were not free from all incumbrance; but on the contrary the plaintiff avers that, at the time of making said deed, one E. F. had the paramount and lawful right and title to the same premises; by reason whereof the plaintiff has been obliged to expend and has expended a great sum of money, to wit: the sum of ——— in extinguishing the said paramount and lawful right and title of the said E. F. to said premises." See also 2 Chitty on Pleading, 548-559; 5 Wentworth's Pleading, 63. The form will of course vary with the nature of the incumbrance and the manner in which the damages have been sustained. The superior title is here set forth with sufficient particularity. It is never necessary in suing upon any of the covenants to set forth the particulars of the paramount title or incumbrance—these are supposed to be beyond the plaintiff's knowledge. *Proctor v. Newton*, 2 Lev. 37; *Skinner v. Killys*, 1 Shower, 70; *Foster v. Pierson*, 4 Term R. 617; *Hodgson v. The East India Company*, 8 id. 278; but it is necessary that the plaintiff should state the precise manner in which he has been damnified. *Howes v. Brushfield*, 3 East. 491; *Ellis v. Welch*, 6 Mass. 246; *Duval v. Craig*, 2 Wheaton, 45; *De Forest v. Leete*, 16 Johns. 122; *Funk v. Voneida*, 11 S. & R. 109. There are cases, however, in which it would seem that this was not done, as where the plaintiff has extinguished the incumbrance after suit brought, and been held entitled to recover the amount paid for that purpose. *Kelly v. Low*, 18 Maine, 244; *Foote v. Burnet*, 10 Ohio, 317; *Pomeroy v. Burnet*, 8 Blackf. 143; *Brooks v. Moody*, 20 Pick. 476.

¹ 11 Serg. & Rawle, 113.

of a mortgage on the premises of the purchaser got to be publicly known, his creditors becoming anxious for their security, pressed him, and the property was sold at a sacrifice, and Duncan, J., said, "If the plaintiff had laid the consequential damages he offered to prove, the evidence should have been received, but as they were not laid, and not confessed by the plea of covenants performed, it is evident the evidence was properly overruled. If he had discharged the mortgage, this ought to have been stated as the actual *gravamen*. So, if by a judicial sale he had sustained, as was alleged, the ultimate damage which he ever could have sustained, this *gravamen* ought to have been laid."¹

In cases where there are known incumbrances of any kind, subject to which the purchaser agrees to take the property, these should be specially and expressly excepted from the covenant, for otherwise the fact of their being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it.² The only object of proving the knowledge on his part, is to raise a presumption, more or less strong, that he agreed to run the risk of the incumbrance, or in other words, that the incumbrance was to be excepted from the operation of the covenant; and if this be really the case, it is always in the power of the vendor to make it appear so on the face of the deed, and if he has not taken care to do this, he is not, it seems, allowed to repair the consequence of his own carelessness. "It is no

¹ Batchelder v. Sturgis, 3 Cushing, 201.

² In considering these remarks upon the subject of the purchaser's notice, the reader will of course observe the distinction between the different rules of law which govern the contract *before* its consummation, by the execution of the deed, and those which apply *after* that time. See *infra*, Chap. XIII.

answer," said Duncan, J.,¹ "to the purchaser's complaint, to say it was his duty to search the record, and to have protected himself by some special covenant against this specific incumbrance. It was no part of this case that he had actual notice; but if he had, it could make no difference. The purchaser covenanted against all incumbrances. The rule as to the vendee is *caveat emptor*. So let the vendor take care of the covenants he enters into. Notice of the mortgage would make no difference, as was determined in *Levit v. Witherington*.² In an indenture reciting a lease, where the party covenanted that the original lease was good and unincumbered, on action of covenant alleging an incumbrance, notice of it was pleaded, and on demurrer, the plaintiff had judgment. An action on the case for deceit, would, I apprehend, lie, if there was no covenant, the incumbrance being concealed. In that action, notice to the grantee would be decisive in favor of the grantor; but it cannot alter the case in this action of covenant."

The same principle has been since applied.³ "How can the plaintiff's knowledge," said Williams, Ch. J., in *Hubbard v. Norton*, "destroy the effect of the

¹ *Funk v. Voneida*, 11 Serg. & Rawle, 112.

² *Lutw.* 317.

³ *Townsend v. Weld*, 8 Mass. 146; approved in *Harlow v. Thomas*, 15 Pick. 70, and said to be "of unquestionable authority;" *Porter v. Noyes*, 2 Greenl.; *Donnell v. Thompson*, 1 Fairf. 177; *Hubbard v. Norton*, 10 Connect. 433; *Jacques v. Esler*, 3 Green's Ch. 61; *Dunn v. White*, 1 Alab. 646. And on the same principle it has been held that mere notice does not preclude the covenantor from relief in a Court of Equity, by way of detaining the purchase money to the amount of the incumbrance when it is one covenanted against, *Stockton v. Cook*, 3 Munf. 68, unless indeed the purchaser come into equity to rescind the contract on the ground of fraud, in which case the notice is of course an answer to the charge. *Funk v. Voneida*, 11 Serg. & Rawle, 109. See Chapter XIII.

defendant's covenant? Suppose the defendants had sold a farm which they and the purchaser both knew they did not own—could that knowledge destroy or affect the nature of the covenant of seizin? If not, by what rule can such knowledge impair a covenant of warranty against incumbrances?"¹ Such evidence has been excluded on two grounds, one, because the issue of notice is an immaterial one,² and the other under the rule that parol evidence shall not be admitted to control or contradict the effect of written instruments.³

In *Suydam v. Jones*,⁴ though the action was brought on a covenant of warranty, it was held, that an agreement between covenantor and covenantee, that the latter should take the property subject to a mortgage, could not defeat the right of a subsequent purchaser from the latter to sue upon the covenant. Apart from the question that arose upon the pleadings,

¹ *Grice v. Scarborough*, 2 Speers, 654. ² *Harlow v. Thomas*, 15 Pick. 70.

³ *Townsend v. Weld*, 8 Mass. 146; *Porter v. Noyes*, 2 Greenl. ; *Donnel v. Thompson*, 1 Fairf. 177. Of course a written agreement would control the effect of the covenant. *Copeland v. Copeland*, 30 Maine, 449. "It is impossible to avoid seeing," said Kennedy, J., in *Collingwood v. Irwin*, 3 Watts, 309, where the covenantor offered to show that at the time of the execution of the deed it was agreed that the assignment of a certain judgment should be the only security of the covenantee, and that the former was not to be held liable on his covenant, "that to admit such proof, would not only be admitting evidence to contradict, but to alter and change most materially the character and effect of the deed. Instead of being a deed with covenant of general warranty, as it purports on its face, it would, by the operation of the evidence proposed to be given, become a deed without any engagement whatever on the part of the grantor for the goodness of the title. It is not pretended that there was any mistake or fraud committed in introducing the covenant of general warranty into the deed: the evidence therefore is not offered with a view to obtain relief from the one, nor for the purpose of correcting the other. . . . The evidence offered then in the case under consideration being oral, falls directly within the general rule, that it shall not be admitted to *contradict*, *alter*, or *vary* the written agreement between the parties to it. The Court was therefore right in rejecting it."

⁴ 10 Wend. 184.

"the principle," said Sutherland, J., "that a written contract or instrument cannot be essentially varied by parol, seems to be applicable to this case, and to exclude the defence. The covenant in the defendant's deed, it is conceived, embraces in its terms the mortgage under, and by virtue of which the plaintiff has been evicted. . . . The pleas do not charge the plaintiff with any notice whatever of the secret agreement between the defendant and Sandford, nor with any actual notice of the existence of this incumbrance at the time of his purchase, though if such actual knowledge had existed, I do not conceive that it can vary or affect the case."

There is, however, a class of cases, which, while professing to observe the rule which prohibits the introduction of parol evidence to vary or alter written instruments, still recognize an important exception to it, and proceed upon the ground, that when an agreement has been entered into with an understanding that it shall only be used for certain purposes, or with certain qualifications, that understanding cannot be violated without a breach of good faith.¹ With these cases may be classed a recent case in Indiana, where² evidence was held to be admissible, to show that at the time of the execution of the deed, the vendor said that the purchaser was to take the land with the incumbrance of a lease for life, and that he thought it should be so mentioned in the deed; but that the purchaser replied that he knew that such was the contract, but it was unnecessary to mention it in the deed, as he was about to undertake to keep the tenant for life, and wished to have the whole

¹ See the cases collected in the note to *Woolam v. Hearne*, 2 Leading Cases in Equity, Amer. ed. Part I. 565,

² *Allen v. Lee*, 1 Indiana, 12.

title in himself. Smith, J., in delivering the opinion of the Court, said, somewhat more broadly than was necessary, "A general covenant of warranty does not, at least conclusively, extend to such incumbrances as were known to the purchaser at the time of the contract, and which he agreed to pay or discharge himself in addition to, or as a part of the consideration money from him to the vendor; and where the question is, as in this case, what was the true consideration paid for the land, we think such facts may be given in evidence, without in any manner contradicting the terms of the written warranty." It must, however, be observed of this case, that it was not one of a suit upon the covenant, but the defence of a lease for life was set up in opposition to the payment of a note given for the purchase money. In such cases, the tendency of Courts seems strongly to lean in favor of the plaintiff, unless where there has been practiced any fraud, or what is deemed equivalent to it.¹

It has, moreover, been said that the fact of the purchaser having notice of an incumbrance, is the very reason for his taking a covenant within whose scope it is included,² and that the vendor may be expected to discharge it out of the purchase money.³

When, therefore, the contract is, that the purchaser takes the land *cum onere*, it should be expressly mentioned, and the incumbrance excepted from the operation of the covenant, in which case, of course, the covenantor will not be liable.⁴

¹ See *infra*, Chapter XIII.

² *Jacques v. Esler*, 3 Green's Ch. 463; see *Batchelder v. Sturgis*, 3 Cushing, 204.

³ *Harlow v. Thomas*, 15 Pick. 70; *Grice v. Scarborough*, 2 Speers, 654; *Dunn v. White*, 1 Alab. 646.

⁴ *Potter v. Taylor*, 6 Vermont, 676.

It is true that there seems to have been thought a necessity for this precaution of excepting the incumbrance as well on the part of the purchaser as that of the vendor; for, as Sir Edward Sugden has observed, "It sometimes happens that a purchaser consents to take a defective title, relying for his security upon the vendor's covenant. Mr. Butler remarks, that where this is the case, the agreement of the parties should be particularly mentioned, as it has been argued that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect."¹ It certainly has been very often argued that the defect being known, it was understood that the covenants were not to extend to it; but perhaps no case will be found in which the argument has been suffered to prevail, in opposition to the general rule, that nothing within the terms of a deed can be excepted from its operation by parol.²

¹ 2 Sugden on Vendors, 449.

² *Savage v. Whithead* is the case cited by Mr. Sugden as the authority for this. That case (reported 3 Chan. Rep. 14,) is as follows: "Sir Thomas Savage, the plaintiff's father, sold lands to the defendant's ancestors, and covenanted that they were free of incumbrances, and gave a collateral security on other lands also, and the purchaser having entered on the security for damnifications, the bill was to have the collateral security re-conveyed; whereto the defendants having set forth divers incumbrances on the purchased land and (*inter alia*) a lease of twenty-one years of parcel thereof, the plaintiff replied generally; and at the hearing, a re-conveyance was decreed on satisfaction of the damnification; and upon the report the plaintiff excepted against the lease, that it was no incumbrance, because they had proved the purchaser had notice of it at the time of the purchase, whereto the defendants insisted that the notice was not in issue in the case; yet Lord Keeper Bridgman would not conclude the infant by a slip of her counsel, in not putting it in issue upon the replication, but ordered a trial whether the purchaser agreed to take the lands charged with the lease."

The rules that have been adopted as to the measure of damages for a breach of this covenant, are, when stated as general propositions, very simple. In the first place, nothing is better settled than that if the incumbrance is still contingent in its character, and if nothing has been paid by the plaintiff towards removing or extinguishing it, and if it has inflicted no actual injury upon him, he can obtain but nominal damages, as he is not allowed to recover a certain compensation for running the risk of an uncertain injury.¹

The injustice that might arise from a contrary course of decision is sufficiently obvious. It by no

The eminent reputation of Sir Orlando Bridgman as a common law judge, gives great weight to any decision he is reputed to have made in that capacity. But it is equally familiar that "he made a very bad chancellor. He never seemed to apprehend what Equity was." Roger North in writing of him said, "he was timorous to an impotence, and that not mended by his great age. He labored very much to please everybody . . . if the case admitted of divers doubts, which the lawyers call points, he would never give all on one side, but either party should have somewhat to go away with." Cited in 3 Campbell's Lives of the Chancellors, 231. This case seems an example of the criticism, and is not supported by any other authority that I have been able to find. Sir William Grant, however, one of the best Judges who ever sat in Equity, observed in *Ogilbie v. Foljambe*, 3 Merivale, 621, "Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice." This was probably in reference to the case of *Savage v. Whithead*.

¹ *Vane v. Lord Barnard*, Gilbert's Eq. Rep. 7, per Lord Cowper; *Bean v. Mayo*, 5 Maine, 94; *Rundell v. Mallet*, 14 id. 51; *Herrick v. Moore*, 19 id. 313; *Richardson v. Dorr*, 5 Verm. 9; *Davis v. Lyman*, 6 Conn. 255; *Prescott v. Truman*, 4 Mass. 627; *Wyman v. Ballard*, 12 id. 304; *Jenkins v. Hopkins*, 8 Pick. 348; *Leffingwell v. Elliot*, id. 457; *Tufts v. Adams*, id. 549; *Brooks v. Moody*, 20 id. 474; *Comings v. Little*, 24 id. 269; *Pitcher v. Livingston*, 4 Johns. 10; *Delavergne v. Norris*, 7 id. 358; *Hall v. Dean*, 13 id. 105; *Stannard v. Eldrege*, 16 id. 254; *Baldwin v. Munn*, 2 Wendell, 405; *Gilbert v. Minan*, 1 Comst. 563; *Patterson v. Stewart*, 6 Watts & Serg. 528; *Foote v. Burnett*, 10 Ohio, 317; *Whistler v. Hicks*, 5 Blackf. 100; *Smith v. Ackerman*, id. 541; *Pomeroy v. Burnett*, 8 id. 143.

means follows, because the land which is the subject of the purchase is bound by a mortgage or a judgment, that the holder of these incumbrances will look to that land for their payment. He may resort to other property of the party originally bound.¹ To allow, then, a covenantee to recover the amount of such an incumbrance, might subject his covenantor to a double loss arising from the same cause.

When, however, the incumbrance has inflicted an actual injury upon the purchaser, the rule can only be generally stated, that the damages are sought to be proportioned to the actual loss that has been laid in the declaration and proved. Thus if it be of a character which cannot be extinguished, such as an easement or servitude, an existing lease, &c., it is said that the damages are to be estimated by the jury according to the injury arising from its continuance.²

But while it may be easy to lay down this as a general proposition, there seems considerable difficulty as to its application. Thus in one case the purchaser was evicted by the holder of an unexpired term, and it was held that "the extent of that term and the annual value or the interest of the purchase money, should be the measure of damages."³

¹ *Delavergne v. Norris*, 7 Johns. 358; *Davis v. Lyman*, 6 Connect. 255; *Brooks v. Moody*, 20 Pick. 474.

² *Prescott v. Truman*, 4 Mass. 630; *Harlow v. Thomas*, 15 Pick. 69; *Batchelder v. Sturgis*, 3 Cushing, 205; *Hubbard v. Norton*, 16 Connect. 432.

³ *Rickert v. Snyder*, 9 Wendell, 423. The jury had, on the trial, been directed to assess the damages by the consideration money paid for that part from which the plaintiff had been evicted, which the Supreme Court said would have been correct if a breach of the covenant for seizin had been proved, but that the evidence went to the possession and not to the right of property. There was not, in fact, a covenant against incumbrances in the deed, the covenants being for quiet enjoyment and of warranty; but the case is here introduced as illustrative of the principle.

But in a very recent case in Massachusetts,¹ it was said that "this rule may do justice in some, perhaps in many cases, but this Court is not prepared to adopt it as a general rule. Where the incumbrance has been removed, the general rule in this Court fixes the damages at the amount paid to remove the incumbrance. . . The rule is, that for such incumbrances as a covenantee cannot remove, he shall recover a just compensation for the real injury resulting from the incumbrance. Though it is desirable to have as definite and precise rules upon the subject of damages as are practical, it seems impossible to establish any more precise general rule in this class of cases." In this case it was held that the diminished value of the land by reason of the lease was not the measure of damages, unless the estate were purchased for the purpose of a re-sale, and that fact were communicated or known to the grantor.

If the character of the incumbrance be such as to admit of removal, the plaintiff is entitled to recover the amount which he has fairly and reasonably paid for its extinguishment.² But in advancing this proposition, it must be taken with the qualification that this amount must not exceed the consideration money and interest, in those States in which, on covenants

¹ *Batchelder v. Sturgis*, 3 Cushing, 201.

² *Davis v. Lyman*, 6 Connect. 255; *Wyman v. Brigden*, 4 Mass. 150; *Wyman v. Ballard*, 12 id. 304; *Chapel v. Bull*, 17 id. 221; *Tufts v. Adams*, 8 Pick. 549; *Brooks v. Moody*, 20 id. 475; *Comings v. Little*, 24 id. 266; *Batchelder v. Sturgis*, 3 Cushing, 205; *Waldo v. Long*, 7 Johns. 173; *Dela-vergne v. Norris*, id. 358; *Hall v. Dean*, 13 id. 105; *Stannard v. Eldredge*, 16 id. 254; *Baldwin v. Munn*, 2 Wend. 405; *Funk v. Voneida*, 11 Serg. & Rawle, 112; *Cane v. Allen*, 2 Dow, 296, per Lord Redesdale. Nor does it seem material whether this amount be so paid before or after the bringing of the action on the covenant. *Kelly v. Low*, 18 Maine, 244; *Brooks v. Moody*, 20 Pick. 478; *Foote v. Burnet*, 10 Ohio, 317; *Pomeroy v. Burnett*, 8 Blackf. 143.

for quiet enjoyment and of warranty, the limit of damages is the same as on the covenant for seizin. This was decided in *Dimmick v. Lockwood*,¹ where the application of the rule was one of some hardship. The premises had been conveyed by two tenants in common to the plaintiff in consideration of \$250. He made improvements which increased the value of the land to \$2000, and afterwards one half of this property was sold under an execution, upon a judgment for \$3344, which was held against one of these tenants in common. The plaintiff brought an action on his covenant against incumbrances. The defendants in their plea tendered the sum of \$125, his half of the consideration money paid, and contended that this must be the limit of damages. The plaintiff urged that he was entitled to recover an amount sufficient to indemnify him for the damages he had sustained, and that inasmuch as, under all the authorities which have been quoted above, he would have been entitled in case he had paid the amount of the judgment to recover what he had thus paid, he should be allowed damages to the amount of the incumbrance, without regard to the amount of the consideration money. It was said by the Court that no similar case was to be found in the books. Those arising on covenants against incumbrances had been cases where the incumbrance was less than the consideration money, and in them there was little difficulty. But that it had been often and conclusively settled that a purchaser could not increase his damages by reason of improvements, which the plaintiff would indirectly seek to do by the doctrine contended

¹ 10 Wendell, 142.

for. "It may be asked," it was said by Savage, Ch. J., "to what extent may a purchaser go under such circumstances in creating a claim against his vendor? Suppose the plaintiff instead of building a house had paid \$3000, and brought this suit to be reimbursed, he would bring himself within the language of some of the judges, who say that a purchaser is entitled to recover what he has paid, and yet I apprehend he would not be permitted to recover that amount. But suppose again, what is probably the real state of this case, two persons are tenants in common of an acre of ground worth \$100, one a wealthy man and the other insolvent; being tenants in common, they unite in a conveyance with the usual covenants; can the purchaser pay a lien of \$3344, a debt due by the insolvent, and recover it from his tenants in common, who may have no earthly connection with him? I state this case hypothetically, to show how the rule contended for by the plaintiff may work the height of injustice to a mere stranger. . . Among all the cases cited, there is none in our own Court where the purchaser has been permitted to recover beyond the consideration and interest and costs. There is none in Massachusetts where, under the covenant against incumbrances, the purchaser has recovered any more, though there the rule allows a recovery for the value at the time of eviction. All the reasons of our own judges go to limit the responsibility of the grantor to the consideration with interest and costs, and I am unwilling to go further where the principles to be established may lead to great injustice."

The case of *Foote v. Burnet*¹ was decided upon the

¹ 10 Ohio, 334.

same principle. The consideration paid was \$1020, and the purchaser had extinguished an incumbrance amounting to \$1773.95, which sum he claimed as his measure of damages. But it was said by Hitchcock, J., "If this be correct, then upon this covenant, a recovery to a much greater amount may be had than upon the covenant of warranty, which is ever considered the principal covenant in a deed. . . . If in the present action he can recover this amount with interest, he recovers more than he would have done had he entirely lost the land. There would seem to be some inconsistency in this." After referring, then, to the case of *Dimmick v. Lockwood*, it was said, "After full consideration and careful examination, we have been led to the conclusion, that the law is as laid down in this case. That the true measure of damages, in an action for the breach of the covenant against incumbrances, is the amount paid to remove the incumbrance, with interest, provided the same do not exceed the purchase money and interest. But in no case can a purchaser recover greater damages for the breach of any of the ordinary covenants in his deed, than for a breach of the covenant of warranty."

It seems correctly stated by Savage, Ch. J., in *Dimmick v. Lockwood*, that there is no case in Massachusetts where the purchaser has been suffered to recover more than the consideration money for a breach of the covenant against incumbrances, although in that State, as in some others, upon a covenant of warranty or for quiet enjoyment, the damages are measured by the value of the land at the time of eviction.¹ However the decision of *Dimmick v. Lock-*

¹ See Chapter VII.

wood might have been in those States, in case the covenant against incumbrances was the only one in the deed, it seems probable, that had it been accompanied with a covenant of warranty, the damages would have been assessed as for a breach of that covenant, and by that means the purchaser could have had allowance for his improvements.¹

¹ Norton v. Babcock, 3 Metcalf, 519. See this case cited at page 139.

Mr. Sedgwick, in that part of his "Treatise on the Measure of Damages," which refers to these covenants, considers the case of Dimmick v. Lockwood, to be open to much observation, and greatly to diminish the value of the covenant against incumbrances. "By surrendering the property to the previous incumbrance, a valid claim may always be created, to the extent of the consideration money, and to this it seems the recovery under this covenant is in every instance to be limited. A case may, however, easily be imagined, where the incumbrance is well known, where the consideration money is a fair representative of the value without the incumbrance, where the grantor agrees to remove it, and the covenant against incumbrances is inserted for the express purpose of making it certain that he will do so. In such a case, the application of this principle would be extremely inequitable. For it must not be forgotten that the severity of the arbitrary rule which declares the consideration named in the deed to be the actual price paid, is but little mitigated by the permission given to the parties to contradict it by parol proof. Such evidence, after the lapse of a few years, will generally be difficult of production, in many cases impossible, and the mere burthen of proof is always a serious responsibility."

It may be observed, however, that when the incumbrance is greater than the consideration money, the damage to the purchaser can never exceed the amount of the latter, unless, as in Dimmick v. Lockwood, he has made valuable improvements, or the land has increased in value; in both of which cases, we have seen the decisions in New York, and in most of the States, allow no increase of damages by reason of those circumstances; and it seems, therefore, rather with this principle, than with the decision in that case, that fault should be found, if any exists.

The evident partiality borne to the civil law by the learned author, has caused him to regard this principle with little favor, even though in the civil law itself the doctrines on this point are extremely contradictory and inconsistent. Dig. lib. 19, tit. 1, 45, § 1; Institutions au Droit Française, liv. 3, c. 13. In the case to which he refers as an instance of hardship, the only difficulty would be the production of evidence to show that the consideration as expressed was exclusive of the incumbrance, the admission of which has been allowed by a strong current of authority, and it would seem better that the purchaser should have a burden of proof thrown upon him, which might even in some instances, be too great to be overcome, than that a rule

When the incumbrance is such as entirely to defeat the estate conveyed, but its consequences have not been such as to cause an eviction within the scope of the covenant of warranty, the damages are measured by the consideration money and interest.¹ The case of *Chapel v. Bull* decided, as was said in a subsequent case,² that "on a breach of covenant against incumbrances, where the incumbrance was changed into a title adverse and indefeasible, the plaintiff was entitled to recover the money he had paid for the land, with interest. For in such case, the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance, nor can he enter upon and enjoy

should be introduced contrary to precedent in those States, and contrary to that prevailing in actions on the other covenants. The case, also, supposed in the opinion in *Dimmick v. Lockwood*, seems to be equally as hard as any that could be imagined under the opposite doctrine. It might be said that there is a moral reason why there should be a different rule under this covenant, which is, that a defect of title, such as to cause a breach of the covenants for seizin, and of right to convey, generally originates in mutual error, while every man is supposed to know what judgments are outstanding against him, what mortgages he has given, what easements are incident to the property, &c. But the answer to this may be, that if it could be shown, that fraudulent representations were made to the purchaser, or that the vendor were guilty of undue concealment, the measure of damages would not, as we have seen, be limited to the extent of the consideration money, but would be increased to that of the actual loss, whatever that might be, or by whatever circumstances occasioned. *Bitner v. Brough*, 11 Penn. State Reports, (1 Jones,) 139.

¹ *Chapel v. Bull*, 17 Mass. 221. In this case, while proceedings in partition were pending between tenants in common, one of them sold his purpart, covenanting against incumbrances. The sheriff having returned to the writ of partition, that the premises could not be divided without spoiling the whole, and none of the parties taking the land at its appraisement, it was, under an order of sale, exposed to auction, and sold to a purchaser, who took his deed, and entered into possession. Under these circumstances, it was held by Parker, Ch. J., that there was a manifest breach of the covenant against incumbrances, and that the measure of damages was the whole consideration money and interest.

² *Jenkins v. Hopkins*, 8 Pick. 349. So, in *Waldo v. Long*, 7 Johnson, 173; *Barret v. Porter*, 14 Mass. 143.

the land; and it would be idle to require him to purchase it, in order that he might be entitled to his damages for the breach of the covenant against incumbrances. Indeed, such a state of facts comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee, so that he can be evicted. And this constitutes a difference between cases of this kind and the common cases of mortgage, attachment, or rights of dower, which may be removed by the grantee, and the amount of his damages ascertained in that way.

“The principle which constitutes a difference between the case of *Chapel v. Bull*, and the cases in which it has been held, that for a breach of the covenant against incumbrances nominal damages only can be recovered, unless the incumbrance had been removed, is, that in the latter case the plaintiff is in possession of the estate, is undisturbed in the enjoyment, and may remain so; whereas, in the former case, and that now before us, the plaintiff is not in possession, nor can he enter without being a trespasser upon one who has the title, and who is presumed to be in possession according to his title.”

When, however, such circumstances exist as enable the plaintiff, although out of possession, to obtain it by the payment of a certain sum, that amount and no more is allowed him, as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum. Thus, where¹ land which was subject to a mortgage was conveyed with covenants against incumbrances and of warranty, the mortgagee had obtained a conditional

¹ *Tufts v. Adams*, 8 Pick. 549.

judgment, and been put in possession by a writ of *habere facias*. “But it does not necessarily follow,” said Parker, Ch. J., “that the damages should be assessed to the value of the land, because the right of redemption is open, and the plaintiff may discharge this incumbrance, and restore himself to possession by paying the debt and interest and the costs of suit. Indeed, there seems to be no reason why, on such an eviction, which, at the election of the plaintiff, may be defeated, any more damages should be recovered than will indemnify the plaintiff; for if the whole value of the land should be assessed in damages, the plaintiff might pay the debt secured by the mortgage, and thus hold an indefeasible title, which is all he has a right to exact from the defendant. It appears reasonable, therefore, that for this breach of the covenant of warranty, the proper rule of damages should be to give the amount due upon the mortgage, with the costs of the suit upon the mortgage against the plaintiff, and thus he will be enabled to redeem the lands from the funds of the defendant. If he should not redeem, but suffer the equity to be foreclosed, then if there shall be any loss, he will have no right to complain.” So in a subsequent case,¹ Shaw, Ch. J., held the following language: “If the right of redemption is not foreclosed, and the land may be redeemed for less than its value, the amount to be paid for such redemption, the amount due on the mortgage will be the measure of damages, because it will afford the plaintiff a complete indemnity. Cases may be supposed where the outstanding mortgage, though assuming the form of a paramount title, which, if not

¹ White v. Whitney, 3 Met. 89.

redeemed, would take the whole estate and evict the covenantee, yet being very small in amount, in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such case, it would be quite unreasonable to hold that the covenantee, on such an eviction, should recover damages to the full value of the estate."

Although there has been no direct decision in point, it is probable, judging from the tone of the remarks in the cases in Massachusetts, and other of the New England States, where, on a covenant of warranty, the value of the land at the time of eviction forms the measure of damages, that in a case similar to *Dimmick v. Lockwood*,¹ the limit of the recovery would be extended beyond the consideration money and up to the value of the land, but could never exceed the latter.²

¹ 10 Wendell, 142.

² In *Norton v. Babcock*, 2 Met. 510, it appeared that the defendant had acquired the estate by means of a judgment against its former owner, by virtue of which, under local laws, the land had been set off to him, leaving however, in the judgment debtor, an equity of redemption. Under these circumstances, the plaintiff purchased the premises of the defendant, "with the usual covenants of seizin and warranty, and against incumbrances." Subsequently, the equity of redemption was levied on and sold under another judgment against the same original owner, and the purchaser of this equity gave notice to the purchaser of the property of his intention to redeem, to prevent which the latter paid him \$602.89, being the amount with interest, for which the equity had been purchased, and then brought suit upon the covenants. The extreme accuracy of most of the principles laid down in this case, though to some extent of local application, may warrant their insertion at some length. "It appears," said Shaw, Ch. J., "by the statement of facts reported as found by the jury, that more than a month before the expiration of the right of redeeming the estate levied upon by the defendant, and by him conveyed to the plaintiff with covenants of warranty, Edward A. Phelps, the holder of this right to redeem, gave notice to the plaintiff of his intention to redeem; whereupon the plaintiff, in good faith, and in order to discharge that right to redeem, and enable himself to retain

The remarks and authorities submitted in the chapter on the covenant for seizin, as to the recovery

the estate, paid \$602.89, in order to extinguish such incumbrance. The value of the estate at that time, as found by the jury, was \$1200; and the value of the improvements made upon it, \$500.

It is contended for the plaintiff, that the amount thus paid by him to extinguish the incumbrance, is the measure of his damage. But we think this cannot be laid down as a rule of damages, without considerable qualification. Where the incumbrance is of such a character, that if not extinguished it would take the whole estate, and it can be extinguished for less than the value of the estate, so that the amount paid for its extinguishment would bring a less onerous burden upon the covenantor than he would have to sustain by an eviction, it being for his benefit as well as that of the owner to extinguish it, the amount paid for extinguishing would be the measure of damages, because it would afford the plaintiff a perfect indemnity. Otherwise, the amount thus paid, exceeds the amount which the covenantor would have been bound to pay, if the plaintiff had been evicted.

For instance, we will suppose the case of a conveyance with the usual covenants against incumbrances, and covenants for warranty. There is an outstanding mortgage, and the mortgagee is about to close and oust the grantee. He must redeem or be evicted. If he is evicted, he will have a remedy on his covenant, and recover the value of the land at the time of the eviction and interest. Now if the value of the land be \$2000, and the amount of the mortgage with interest, \$2500, should the grantee redeem and pay \$2500 to extinguish the incumbrance, he could not recover that sum of his warrantor, although the incumbrance could not be extinguished for less; because the covenantor is liable only for the value of the land. But if the mortgage should amount to \$1500, and the grantee should pay that sum to redeem, it would constitute the measure of damages; because it would afford an indemnity to the plaintiff, and bring a less charge on the covenantor than if the grantee had permitted the mortgagee to foreclose. . . . In *Wyman v. Bridgen*, 4 Mass. 150, the estate conveyed by the defendant to the plaintiff with covenants, was rightfully levied upon as the estate of Moses Gill deceased, for \$1800. Before the year expired, the defendant—(it should be plaintiff, as the case shows,) never having been put out of actual possession, redeemed by paying the \$1800, it being found that the estate was worth \$3000. It was held that the plaintiff having derived from the defendant all his estate in the land, including the right to redeem, at a less sum than the actual value of the land, for which he might have been liable on eviction, the difference should enure to the benefit of the covenantor, and that therefore the sum paid for such redemption should be the measure of the plaintiff's damage.

We are then to apply this rule to the present case, and the result will be, that if the sum of \$602.89, paid by the plaintiff to extinguish the right of redeeming, was less than the defendant would have been liable for, had the

by the covenantee of interest, and of the costs and expenses paid by him to extinguish the incumbrance, may be referred to as equally applying to this covenant.

plaintiff permitted Phelps to redeem, then that is the measure of damages for which the defendant is now liable. If it exceeds that amount, then he is liable only for the smaller amount.

Had the plaintiff declined the offer to pay, what would have been the amount of damages? As the estate granted by the defendant to the plaintiff actually passed by the conveyance, the defendant being seized, and having good right to convey, subject only to redemption by his creditor, the amount of damages he would have been liable for on his covenants, was the value of the land at the time of the eviction. *Gore v. Brazier*, 3 Mass. 543. The value of the land, independent of the improvements, was then \$1200, and the value of the improvements \$500; making in round numbers \$1700. By improvements, we here understand buildings or betterments, other than repairs, made by the defendant or the plaintiff after the levy, and before the expiration of the year allowed by law for the redemption. The great difficulty probably arises from the fact of these expensive betterments made upon a defeasible estate. We are of opinion, that if they were made by the creditor after the levy, the debtor could not be charged with them on redemption, for the reasons above stated. And being annexed to the realty, and having become part of the freehold, they would have constituted a part of the actual value at the time of redemption. Suppose them made by the plaintiff, they were made by him after he had acquired a title purporting to be absolute and indefeasible under the defendant's deed of warranty; and we are of opinion, that as between the plaintiff and defendant, the loss must fall on the latter. It arises from want of caution in giving such a deed, when in fact he had only a defeasible estate. It follows, that if the plaintiff instead of paying the sum he did, to extinguish this right of redemption, had yielded to it, and given up the estate, his right on the defendant's covenant would have been to recover to the value at the time of the redemption, enhanced by the value of the betterments which he made upon it, deducting the sum he would have received on redemption.

We think there must be a more exact statement of the account and assessment of the damages, upon these principles. If the sum paid by the plaintiff for a release of the right of redemption was less than the defendant would have been liable for on redemption, then the sum thus paid by the plaintiff would give him a complete indemnity, and would be the measure of his damages; but if he paid more, in order to redeem the estate, than the defendant would have been liable to him for, upon an actual redemption, then the damage on this breach of covenant cannot exceed the last mentioned sum."

In the subsequent case, however, of *White v. Whitney*, 3 Met. 89, it seems to have been thought, that in cases where the outstanding incumbrance was

It may be asked, are there no instances in which a covenantee against incumbrances may recover substantial damages by reason of an incumbrance, which, although it has not yet inflicted actual loss, is yet morally certain to do so? For it is not always convenient for a purchaser to pay off an incumbrance so as to entitle himself to recover back from his vendor the amount thus paid; nor, on the other hand, is it in his power to compel the holder of the incumbrance to evict him; or the latter may not have the power to do so, as, for instance, in case of the incumbrance being a mortgage not yet due. In these cases, if there were no other remedy, it would be hard to say, that if the purchaser do not pay off the incumbrance, or be not evicted, his damages shall be but nominal;¹ for his improvements on the property will, of course, cease, and during the time he is waiting for the period of eviction to come round, he may perceive the estate of his vendor becoming less able to meet the demand upon it. Yet, in such embarrassing circumstances, to allow the purchaser to recover the amount of the incumbrance, would seem to be at variance with the rules which have been established.²

small in comparison with the value of the estate, the covenantee could not elect to be evicted under it, and then recover the present value of the land. The language held in that case, where there was a mortgage in possession, and the equity for redemption was in the hands of the covenantee, has already been quoted. See page 138. It seems, however, to have been thought in *Miller v. Halsey*, 2 Green. 48, that a purchaser was not bound to buy in an incumbrance, though offered to him on moderate terms.

¹ See *Hart v. Porter's Executors*, 5 Serg. & Rawle, 205.

² See, *passim*, Sedgwick on the Measure of Damages, 109, 190. The learned author questions the decision of Lord Tenterden in *Lethbridge v. Mytton*, 2 Barn. & Adolp. 772, where, on a covenant to pay off certain incumbrances to the amount of £19,000, no special damage having been laid or proved, and the sheriff's jury having given nominal damages, the inquiry was set aside. I would suggest, subject to correction, that this

For such a difficulty the common law had a remedy which the modern covenants do not afford, through the medium of damages. In the first chapter it was seen that a purchaser could, even upon suspicion of any thing wrong in his title, bring a *warrantia chartæ quia timet*, in which the judgment, when obtained, called a judgment *pro loco et tempore*, bound all the lands of the warrantor from the date of the writ.¹ But, in modern times, such a course of proceeding is unknown in common law courts; and it seems that the only way in which a covenant can possibly be made available under the circumstances referred to, is by recourse to a court of equity, where, however, relief is but sparingly afforded on principles of *quia timet*, and then only, it would seem, where the covenant is employed, not as a means of attack against the covenantor, but as a defence to payment of the purchase money.² Although there have been cases where equity has decreed specific performance of covenants to save harmless, "it being unreasonable that a man should always have a cloud hanging over him,"³ and although such is the usual course with respect to

decision appears perfectly sound, and not at variance with the cases cited *infra* on page 129, as there seems to be a broad distinction between the ordinary covenant against incumbrances, and such a covenant as that in *Lethbridge v. Mytton*, which was to do a thing certain, at a certain time; and as his Lordship remarked, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value." Such a distinction was taken by Woodworth, J., in the *Trustees of Newburg v. Galatian*, 4 Cowen, 343. *Fisher v. Worrall*, 5 W. & S. 478, is an obvious exception to this case. It was there held that a joint owner who covenanted to procure the joinder of the other owner in a deed for the sale of land, was liable for a failure in damages, but not necessarily measured by the consideration.

¹ Fitzh. Nat. Br. 134; Co. Litt. 100.

² See Chapter XIII.

³ *Ranelagh v. Hayes*, 1 Vernon, 189; *Champion v. Brown*, 6 Johns. Ch. 406.

the covenant for further assurance, yet it does not appear that such has been the case when applied to the other covenants for title, and the contrary has been distinctly held with respect to the covenant of warranty.¹

The remarks of Duncan, J., in *Funk v. Voneida*,² may be read with great instruction in this connection, though the strong leaning of that learned Judge in favor of equitable principles, has caused him to regard the *quia timet* jurisdiction of equity much more as a matter of course than it really is.³

¹ *Tuite v. Miller*, 10 Ohio, 383.

² 11 Serg. & Rawle, 116.

³ In considering these remarks, the reader will of course remember, that they were made in a State where equity has from an early period been administered under common law forms.

CHAPTER V.

THE COVENANT FOR QUIET ENJOYMENT.

THIS covenant, which differs materially from those we have been considering, is generally defined to be an assurance against disturbances consequent upon a defective title.¹ While in England it is sometimes called the sweeping covenant, its place has been here to a great extent supplied by the covenant of warranty, the principal or sweeping covenant in American conveyances. It is, however, on both sides of the Atlantic, the only covenant generally inserted in a lease,² and, in Pennsylvania at least, and perhaps elsewhere, in ground rent deeds. Its form when set forth at length is usually in these words: "And that it shall be lawful for the said grantee, his heirs and assigns, from time to time, and all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said lands and premises hereby conveyed or intended so to be, with their and every of their appurtenances, and to have, receive and take the rents, issues and profits thereof and of every part thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction,

¹ Howell v. Richards, 11 East, 641.

² The word "demise," in a lease, is generally held in this country, as in England, to *imply* a covenant for quiet enjoyment; this is considered in the chapter on "Implied Covenants." Chapter X.

interruption, claim or demand whatsoever, of, from or by him, the said grantor, or his heirs or any other person or persons whomsoever."

The form of this covenant is taken from the statute 8 & 9 Vict. c. 119, already referred to, and may be deemed to be the most approved and modern form. It differs slightly from that given by Mr. Platt.¹

The covenant as generally expressed in ground rent deeds in Pennsylvania, is "that the said (grantee) his heirs and assigns, paying the said yearly rent and taxes, or extinguishing the same by purchase, and performing the covenants and agreements aforesaid, shall and may at all times hereafter, forever freely, peaceably and quietly have, hold and enjoy all and singular the premises, &c., and receive and take the rents and profits thereof, without any molestation, interruption or eviction of him the said (grantor) or his heirs or any other person or persons whomsoever;" and when, as is usual, it is intended to be limited to the acts of the grantor, the words are added "or his heirs, or by or with his or their acts, means, consent or procurement."

It is also customary in leases, as well as in ground rent deeds, to precede the covenant with the phrase, that "he the said (lessee or grantee) paying the said rent hereby reserved, shall, at all times, quietly enjoy;" but it has been held, that this does not amount to a condition precedent, and that the covenantor will be held liable on the covenant, even although the rent should be in arrear.²

When expressed in general terms (or, as is commonly said, when the covenant is an absolute or

¹ Platt on Covenants, 312.

² Dallson v. Dyer, 5 Barn. & Adolp. 584.

unlimited one,) it is immaterial for the purpose of the covenant, and the indemnity it affords, by what means, or by whose act the eviction or disturbance covenanted against takes place, so that the eviction or disturbance be lawful.¹ There were several old authorities,² which held that a covenant thus absolutely expressed extended to all interruptions and disturbances whatsoever, whether lawful or tortious; and although authority was not wanting in opposition to this doctrine,³ the law seems not to have been settled until the case of *Hayes v. Bickerstaff*.⁴ That case decided that the covenant, however generally expressed, must be understood as applying merely to the acts of those claiming by title. In the first place it would be unreasonable that a man should covenant against tortious acts of strangers, which he could not foresee or prevent; secondly, the law gives the covenantee a remedy against the wrong doer; thirdly, the covenantee might thus have a double remedy and receive a double compensation; and fourthly, it would enable him to injure the covenantor by colluding with a stranger to make a tortious entry.

These unanswerable reasons have since been consistently acquiesced in, and the rule in *Hayes v. Bickerstaff*, has long been settled law.⁵

¹ *Howell v. Richards*, 11 East, 641.

² See them cited in the margin of the report of *Mountford v. Catesby*, 3 Dyer, 328.

³ *Brooke's Ab. Garranties*, pl. 1.

⁴ *Vaughan*, 118.

⁵ *Tisdale v. Essex*, Hobart, 35; *Wotten v. Hele*, 2 Saund. 180 n.; *Nokes v. James*, Cro. Eliz. 675; *Griffith v. Brown*, 6 Term, 66; *Greenby v. Wilcock*, 2 Johns. 1; *Folliard v. Wallace*, id. 402; *Kent v. Welsh*, 7 id. 258; *Sedgwick v. Hollenback*, id. 376; *Brick v. Coster*, 4 Watts & Serg. 499; *Yancy v. Lewis*, 4 Hen. & Munf. 390; *Pringle v. Witten*, 1 Bay, 254; *Rantin v. Rob-*

The rule of *Hayes v. Bickerstaff*, is, however, subject to three exceptions.

In the first place, the covenant extends to all acts of the covenantor himself, whether tortious or otherwise, provided they be done under color of title,¹ but if the disturbance were not under claim of title, as for instance, a mere trespass, covenant would not lie.²

Secondly, if the covenant be expressly against the acts of a particularly named person, it will not be restrained to his lawful acts, since the covenantor is presumed to know the party against whose acts he covenants, and may therefore be reasonably expected to stipulate against all of them.³

ertson, 2 Strobhart, 366; *Davis v. Smith*, 5 Georgia, 274; *Surget v. Arighi*, 11 Sm. & Marsh. 96.

The three last of these reasons did not apply in the case of *Dudley v. Folliott*, 3 Term, 544, where property which had been conveyed with covenants for seizin and of quiet enjoyment, "against all and every person or persons whomsoever," had been confiscated by the State of New York during the Revolution. The plaintiffs argued that the defendant had no title to the premises, they having been lawfully confiscated by the State of New York, whose independence, as a part of the Union, had subsequently been recognized; but the Court "thinking this question would lead to the discussion of improper topics," would not permit it to be argued. And as to the second question, they thought it equally clear, "for even a general warranty, which is conceived in terms more general than the present covenant, has been restrained to *lawful* interruptions," and judgment was given for the defendant.

¹ *Corus' case*, Cro. Eliz. 544; *Crosse v. Young*, 2 Shower, 15; *Loyd v. Tomkies*, 1 Term, 671; *Wooten v. Hele*, 2 Saund. 180 n.; *Sedgwick v. Hollenback*, 7 Johns. 376. In *Crosse v. Young*, Shower reports a long argument of his own on this point which he *intended* to have made, had not the Court, evidently somewhat to his dissatisfaction, stopped him by deciding in his favor.

² *Penn v. Glover*, Cro. Eliz. 421; *Seddon v. Senate*, 11 East, 72. In *Penn v. Glover*, the disturbance was caused by an entry upon the premises by the defendant, who beat the plaintiff *et sic molestavit, etc.*, but the Court held that this was no breach.

³ *Foster v. Mapes*, Cro. Eliz. 212; *Nash v. Palmer*, 5 Maule & Selw. 374; *Fowler v. Welsh*, 1 Barn. & Cress. 29; *Patton v. Kennedy*, 1 A. K. Marsh, 389. In *Nash v. Palmer*, Lord Ellenborough said, "the rule has been cor-

Thirdly, where the plain intention of the covenant, manifested by express words, is to protect the covenantee against claims of every description; as where it is against all claiming or pretending to claim, it is obvious that the rule should not be so strict as to override the intention.¹

The rule that (subject to these exceptions) the covenant does not extend to the tortious acts of others, naturally leads to another equally well settled, which is, that it extends only to the rights of the parties at the time of its creation, for as all deeds are to be construed according to the intention of the parties, it is to be presumed that they had in view interruptions made by virtue of existing rights, and not others subsequently acquired. This was the common law as to warranty; "all the judges agreed, that when a man bound himself and his heirs to war-

rectly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest, and therefore the law has properly restrained it within its reasonable import, that is to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore reasonably be expected to stipulate against any disturbance from him, whether from lawful title or otherwise."

A corollary of this second proposition is that where a general covenant is made a limited one by an exception, the exception will be strictly construed; as in *Woodruff v. Greenwood*, Cro. Eliz. 517, where tenant in tail with reversion to the Queen in fee, leased for twenty-one years, covenanting that the lessee should enjoy it against all persons without the interruption of any besides the Queen, her heirs and successors, *existentibus regibus vel reginis Angliæ*, the Queen granted the reversion to another, who, upon the death of the tenant in tail without issue, evicted the lessee, who brought covenants and obtained judgment, "for none are excepted besides the Queen and her successors, and not her patentee."

¹ *Chaplain v. Southgate*, 10 Mod. 383.

ranty, they are not bound to warrant new titles of action accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made;"¹ and it is well illustrated by the case of *Frost v. Earnest*,² where the covenantee was ousted by the city corporation, who had opened a street through the property, which had been conveyed with covenant for quiet enjoyment, and the decision was impliedly based upon the reasons of Lord Vaughan, which have just been quoted.³ The grantor could not have foreseen the eviction; it was not done by any one claiming title, and the grantee had the remedy which the Constitution guaranteed to him, and could have had his damages assessed and paid from the proper quarter. "The remedy of the vendee is to look to the legislative provision made for his indemnity, and not to the covenant for quiet enjoyment, which was introduced into covenants for purposes entirely different;" and the same principle has been applied in other cases.⁴

There seems to have been some doubt at one time felt, as to whether a suit in equity, by which a purchaser was disturbed, came within the scope of a covenant for quiet enjoyment against disturbances generally.⁵ This is now well settled in the affirmative,⁶ but Sir E. Sugden has remarked, "It is customary to expressly extend covenants for title to

¹ *Greenlife's Exrs. v. W*——, Dyer, 42 a.

² 4 Wharton, 86.

³ Page 147.

⁴ *Ellis v. Welch*, 6 Mass. 250; *Herrick v. Moore*, 1 App. 313.

⁵ 1 Brownl. 23. In an old book, however, Winch's "*Le Beau Plaideur*," 118, will be found a declaration in which a disturbance by a Chancery suit is assigned for breach.

⁶ *Calthrop v. Hayton*, 2 Mod. 54; *Hunt v. Dunvers*, T. Raym. 370.

equitable charges, disturbances, &c.”¹ With like caution Mr. Preston has observed,² that it is also usual to insert the words, “without any lawful let,” &c., so as to preclude the possibility of question as to the extent of the covenant. The law is now, however, so well settled as to both these points, as to render these precautions apparently unnecessary, and in the most modern conveyances they seem not to be observed.

But it most frequently happens, (at least in England, and also in this country whenever the title is carefully examined,) that a man is unwilling to give general or absolute covenants, and when in the case of a covenant for quiet enjoyment, he is willing to be made responsible only for the acts of himself and those claiming under him, the following clause is added to the form as before expressed, “claiming or to claim by, from, through or under him, them or any of them, or by or with his or their acts, means, consent, default, privity or procurement.”

It must be observed, that in England the words “by or through his or their acts,” &c., are not usually inserted after the covenant for quiet enjoyment, but at the close of the covenant against incumbrances, which is there, as it were, annexed or supplemental to the former.³ This is not the case here—that against incumbrances generally precedes, and the words referred to are inserted, if at all, at the end of the covenant for quiet enjoyment.

These words have been made the subject of several decisions, which it is proper here to refer to. It has been held, that the words “acts and means,” import

¹ 2 Vend. 512.² Shep. Touch. 166.³ See page 105.

something actually done by the person against whose acts the covenant is made. Therefore, where¹ one holding under a lease which contained a power of re-entry, in case of the exercise of any trade or calling on the demised premises, made an under lease, in which he covenanted against interruption by him, or "by or through his acts and means," and the under lessee let the premises again to one, who, in alleged ignorance of the condition, commenced the business of an auctioneer, and the original landlord re-entered, it was held, that the eviction was not within the words of the covenant, for it was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises.

It is, however, obvious, that the acts of the servants or agents of the covenantor are, if committed at his command, as much within the scope of the covenant as if they were his own acts.² But in a recent case in Mississippi,³ in an action by a lessee against his lessor, on a covenant for quiet enjoyment, the breach was, in the declaration, averred to have been caused by the destruction of the premises and expulsion of the tenant by a mob, "moved by exasperation and excitement by them entertained towards the defendant." It was urged for the plaintiff that this was equivalent to an eviction by the lessor himself; but the Court held that it was not sufficient that the mob were induced to do the act, but that the lessor must do the act or excite others to do it, not indirectly but directly. It was not sufficient that the mob were actuated by feelings of malice

¹ *Spencer v. Marriot*, 1 Barn. & Cress. 457.

² *Seaman v. Browning*, 1 Leon, 157.

³ *Surget v. Arighi*, 11 Sm. & Marsh. 96.

or revenge against the defendants; and unless, therefore, it should appear that the acts of the mob were constructively those of the lessor himself, the case would fall within the rule, that the covenant did not extend to the tortious acts of others.

In *Howes v. Brushfield*,¹ the word "default" was held to extend to an arrear of quit rent, which the purchaser was obliged to discharge, although not accruing while the vendor was owner of the premises. It was said, that if it happened to be in arrear in his lifetime, it was a consequence of law that it was of his default in respect of the party with whom he covenanted. But of this decision Sir E. Sugden observes,² that the reader should be cautious how he applies it in practice, as it may lead to conclusions not authorized by prior decisions, since the argument of the Court would seem to apply as well to a mortgage or other incumbrance created by a prior owner, as to an arrear of quit rent, in payment of which a former occupier made default, and thus expand a limited covenant into a general one. It certainly never was imagined in Pennsylvania, where ground rents are, and quit rents formerly were common, that a vendor was ever held liable to his purchaser under a special covenant against incumbrances, by reason of arrears of ground rent, accruing for a longer period than he himself possessed the premises—though if the covenant were a general one, it would, of course, be otherwise.³

The same author remarks, that care must be taken to distinguish this case from *Cavan v. Pulteney*,⁴ where the covenantees were evicted by reason of their covenantor not having suffered a common recovery, which

¹ 3 East, 491.

² 2 Vend. 517.

³ *Hamond v. Hill*, 1 Comyns R. 180.

⁴ 2 Ves. Jr. 544.

would have given him a fee simple, which in the deed he recited that he was seized of, and the consequent eviction by the remainder man, was therefore by the covenantor's "default;" since "the act required to make good the title was within the compass of his own estate and within his power; therefore the omission to do it, was a default by him within the limit of a covenant strictly restrained to his own acts, and he assumed, as far as his own acts or defaults extended, to be seized in fee."

In the subsequent case of *Woodhouse v. Jenkins*¹ there was no such recital of title on the part of the covenantor, who had received from a tenant for life and his son, remainder man in tail, a lease for ninety-nine years; the lessee underlet the premises with a covenant for quiet enjoyment against himself and his heirs, and all persons lawfully claiming under them, "or his or their acts, means, consent, neglect, default, privity or procurement." The tenant in tail and his son both died, and the next remainder man evicted the under lessee, who thereupon brought his action on the covenant. The Court said, that the eviction being by a paramount title, could not be brought within the covenant unless by means of the words "neglect or default" of the covenantor, who certainly might have required his lessors, the tenant in tail and his son, to have suffered a common recovery, but that before a breach could be assigned on these words, it must be averred that the covenantor had the power or means of procuring such common recovery, and that he neglected or omitted to do so. "With such an allegation made and proved, an action of covenant

¹ 9 Bing. 431, and 2 Moore & Scott, 599.

might possibly be maintainable, but not without it. It may, indeed, show a want of discretion in the covenantor that he took leases under such a defeasible title, but a neglect and a default seem to imply something more than the mere want of discretion with respect to his own interests—something like the breach of a duty or legal obligation existing at the time; these words, in their proper sense, implying the not doing some act which he ought to have done, and which he had the power to do, and the not preventing or avoiding some danger to the title which he might have prevented or avoided.”

So in *Stanley v. Hayes*,¹ where a landlord covenanted against any interruption of or by himself, “or any other person or persons lawfully claiming or to claim, by, from, or under him, them, or any of them,” and the premises were distrained upon for non-payment by the landlord of the land-tax, it was briefly held by the Court of Queen’s Bench, that the case was not within the covenant. The quiet enjoyment had not been disturbed by any one claiming “by, from, or under” the defendant, but by some one claiming “against” him.

So in a recent case in Massachusetts,² where the defendant covenanted “against the lawful claims and demands of all persons claiming by, through, or under him, and against no other claims and demands,” it was held that a prior claim for taxes, assessed against the property before it came to the defendant, did not come within the covenant. It was not a claim by, through, or under him.

A somewhat recent case in the King’s Bench,³

¹ 2 Gale & Davidson, 411. See *Ireland v. Bircham*, 2 Scott, 207.

² *West v. Spaulding*, 11 Metc. 556.

³ *Blatchford v. The Mayor of Plymouth*, 3 Bing. N. C. 691.

seems to have been principally decided upon the insufficiency of the breach assigned, though, from expressions used by the Court, it may be doubtful whether they thought the covenant was broken at all. The defendants demised a mill stream of water, except so much water as should be sufficient for the supply of persons whom the lessors should already have contracted with, or should thereafter contract to supply, provided that such a quantity should be left as would be sufficient to supply the mill for twelve hours a day, with a covenant that the lessee should enjoy without interruption of the lessors, or any persons claiming by their acts, means, consent, default, privity, or procurement. The breach assigned was, that the defendants, at divers times between the execution of the lease and the bringing of suit, caused to be procured and drawn off large quantities of water, &c. But on the trial it appeared that nothing had been done since the making of the lease, but that there were outlets to the stream, granted to the parties many years before by Acts of Parliament. It was held, that upon this evidence the breach was badly assigned. The evidence might have suited a breach that persons having rights under prior grants had diminished the quantity of water. If the plaintiff meant that he was injured by contracts entered into by the defendants, previously to the demise, the breach should have been framed accordingly; and Tindal, Ch. J., remarked, that the evidence did not fall within the triple condition of the covenant, the terms of which were made to guard against acts of the defendants individually, acts of persons claiming under them, and acts occasioned by their means and default.

As to the words "means, title, and procurement," in

*Butler v. Swinnerton*¹ (which is said by Lord Kenyon to be the *magna charta* of the liberal construction of covenants for title), land which had been the estate of the wife, was, by fine, granted to the husband and wife, and his heirs. The husband made a lease, covenanting against interruption by "himself, his heirs, executors, or administrators, or by or through any others by his means, title, or procurement;" and the entry of the widow after his death was held within the covenant, because although she claimed title under the deed from the conusor of the fine, yet it was by means of the purchase and *procurement* of the husband; "for if the husband had not procured the fine she should not have had any estate." So a recovery of dower by the wife of the covenantor is within the covenant for quiet enjoyment against all claiming from or under him. "Otherwise," it was said, "if the woman who demanded dower had been mother of the lessor, the action would not then have lain against the heir, because she did not claim by, from, or under the lessor."²

In *Hurd v. Fletcher*,³ a fine was levied of a wife's estate, with a joint power to husband and wife to declare the uses, which they did by reserving a power of leasing and appointing a remainder. The husband then made a lease not warranted by the power, covenanting against interruptions by him or any one claiming by, from, or under him, and the lessee was afterwards evicted by the remainder man on account of the defective execution of the lease. It was contended that the declaration of appointment

¹ Palmer, 339, S. C. Cro. Jac. 637.

² Godbolt, 333; Touch. 371.

³ Dougl. 43.

and the fine were to be considered as one instrument; that the husband only joined in the fine for conformity; and the latter being considered as the act of the wife, (since persons taking under a power claim under the one who creates, and not under the one who executes it,) the remainder man took his estate from the wife and not from the husband, and therefore, that the covenant, which was limited to the acts of the husband, and those claiming under him, did not extend to this case; but Lord Mansfield said, that the husband was a necessary party to the declaration by which the remainder was limited, and the remainder man "certainly claimed under him, within the meaning of this covenant. Undoubtedly the husband had covenanted against his own acts, and the new limitations were created by one of his acts."

So, in the more recent case of *Evans v. Vaughan*,¹ where one, upon his marriage, settled an estate upon himself for life, with remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. He afterwards granted a lease of part of the estate, for the lives of three persons, and covenanted that the lessee should quietly enjoy, during the said term, without the interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right or interest by, from, or under him or any of his ancestors. The lease not being in conformity to the power, on the death of the lessor, his eldest son brought an ejectment, and evicted the lessee. In an action brought by the heirs of the latter against the former, as heir of the lessor, it was urged that the defendant

¹ 4 Barn. & Cress. 261, S. C.; 6 Dowl. & Ry. 349.

could not be said to claim under his father, but in his own right as tenant in tail, under the marriage settlement; but the Court were clearly of opinion, upon the authority of *Hurd v. Fletcher*, that the defendant was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment.¹

As it thus sufficiently appears that the scope of this covenant depends, in so many cases, upon the particular words employed in its expression, it will readily be seen how difficult it is to lay down as a general rule what will cause its breach. It has been constantly confounded with the covenant of warranty; so much so, that in some cases the covenant has been spoken of as a covenant for quiet enjoyment, while in fact it was a covenant to warrant and defend.² It is somewhat generally said in the United States that "the covenants for quiet enjoyment and of warranty are broken only by an eviction,"³ but in order to show this not to be universally true of the former, it is only necessary to refer to its form, as constantly used, stipulating against "any let, suit, interruption," &c. Such a distinction was noticed by that accomplished jurist, Chief Justice Gibson, in a very recent case.⁴ "A covenant for quiet enjoyment," said he, "which resembles the modern covenant of warranty, differs from it in this, that the former is broken by the very commencement of an action on the better title."

There seems to be no doubt that whenever a party

¹ It was also held that by the words "during the said term," was understood the term which the lessor purported to grant by his deed, and not, as contended for the defendant, a term continuing only for the life of the lessor.

² *Coble v. Wellborn*, 2 Dev. 388; *Martin v. Martin*, 1 Dev. 413.

³ See Chapter VII.

⁴ *Stewart v. West*, 2 Harris, 338.

could recover for a breach of a covenant of warranty, he could under the same circumstances, recover for a breach of the covenant for quiet enjoyment, where both covenants were extended or restricted to the acts of the same person. A reference to the consideration of the doctrine of eviction, which is attempted to be treated in the chapter on the covenant of warranty,¹ will, it is hoped, sufficiently point out what is considered in this country a breach of that covenant.

But the converse of the proposition by no means universally holds. Thus, as has just been said, the very commencement of a suit based upon adverse title, will cause a breach where the words of the covenant expressly embrace such an interruption. So the erection of a gate across a lane through which the plaintiff had a right of way to his close, was held to be a breach of a covenant that the defendant would do nothing to molest, hinder or prevent the plaintiff in the quiet possession or enjoyment of the lands.² So of the interruption of a way of necessity through a house,³ the building of a house on part of the premises,⁴ and, on the other hand, (though this was a case of a covenant of warranty) the removal of a house which had formerly been built.⁵

The covenant for quiet enjoyment, like that for further assurance and of warranty, are capable of being taken advantage of by the heir, the devisee or the assignee of the land to which they relate, an attribute of considerable importance, and which is considered in treating on "the extent to which covenants for title run with the land."⁶

¹ Chapter VII.

³ *Morris v. Eddington*, 3 Taunt. 24.

⁵ *West v. Stewart*, 2 Harris, 338.

² *Andrews v. Paradize*, 8 Mod. 318.

⁴ *Hidder v. West*, 3 Lev. 167.

⁶ Chapter VIII.

As respects the pleading in an action for a breach of this covenant, the case of *Hayes v. Bickerstaff*, already cited,¹ sufficiently illustrates the importance of setting forth that the disturbance was under lawful title, as otherwise there would be nothing to show that the defendant was not a mere trespasser, and the declaration would be bad on demurrer.²

It is also well settled that the declaration must state the paramount title to have existed "before and at the time of the execution of the conveyance" to the covenantee,³ otherwise there would be nothing to show that the interruption was not under title derived from the plaintiff himself.⁴

Of course, however, these rules do not apply to an interruption made by the covenantor himself or those claiming under him, or where the covenant is against the acts of a particular named person.

But having set forth that the interruption was made under lawful title, existing before and at the time of the conveyance to the covenantee, it is not necessary that the title should be set forth particularly.⁵ It was earnestly contended in *Foster v. Pier-son*,⁶ and *Hodgson v. the East India Company*,⁷ that the plaintiff should have set forth the adverse title under which he was expelled, but Kenyon, Ch. J., said, "I do not know how it was possible for him to

¹ Vaughan, 118. See *supra*, page 147.

² *Claiming* title, is not sufficient. *Norman v. Foster*, 1 Mod. 101; "*Habens titulum* would have done your business," said Hale, C. J., in that case.

³ *Frost v. Earnest*, 4 Whart. 86; *Naglee v. Ingersoll*, 7 Barr, 205, 206.

⁴ *Jorden v. Twells*, Cas. temp. Hardw. 172; *Wootten v. Hele*, 2 Saund. 181; and see the authorities collected in the note. *Kelly v. The Dutch Church*, 4 Hill, 105; *Naglee v. Ingersoll*.

⁵ *Proctor v. Newman*, 2 Lev. 37; *Buckley v. Williams*, 3 id. 325; *Jorden v. Twells*, Cas. Temp. Hardw. 161.

⁶ 4 Term Rep. 617. ⁷ 8 id. 278. See also note to 2 Bos. & Pull. 14.

set forth the particulars of the titles of the persons who entered upon him; such knowledge could only be acquired by an inspection of title deeds to which he could have no access."

This is not an immaterial point; for although it is generally necessary for the plaintiff to examine the title under which the interruption was made, so as to satisfy himself that it was not tortious, and that his remedy must be, not against the party making it, but against the covenantor, yet if the plaintiff were to attempt to set out the particulars of this title it might, if not perfectly correct, be successfully traversed by the defendant.¹

On the trial the burden of proof is thrown directly

¹ A form of a breach of the covenant for quiet enjoyment is thus given in 2 Greenleaf's Evidence, § 243. "After reciting the execution of the deed and the covenant in its very words, Now the said plaintiff in fact says, that he has not been permitted so to possess and enjoy the said premises; but on the contrary he avers, that, after the making of said deed, to wit, on the day of _____, one E. F. who at the time of making said deed had, and ever since, until the molestation of the plaintiff hereinafter mentioned, continued to have lawful right and title to said premises, did enter into the same, and did thence eject, expel, and remove the plaintiff, and hold him out of the possession of the same, contrary to the form and effect of the covenant aforesaid, etc."

This form is concise in the extreme. One more full and precise will be found in 2 Chitty's Pleading, 545-6, containing also an averment of costs incurred in defending an ejection, and also of expenses in improvements, (see as to the latter, *Lewis v. Campbell*, 3 J. B. Moore, 35, and *infra* Chapter VII.) Another still more full, in which the breach assigned is an interruption by persons claiming common of pasture, will be found in 5 Went. Plead. 56, 60. Another, in 5 Went. Pl. 63, where on a covenant for quiet enjoyment and against incumbrances, the breach assigned was that the defendant suffered the ground rent to fall in arrear, *per quod* the plaintiff was obliged to pay it to avoid distress. A good form will also be found in *Lewis v. Campbell*, 3 J. B. Moore, 35. See also *Evans v. Vaughan*, 4 Barn. & Cress. 261, and the cases to which reference has been made on pages 152-158. Some old forms may also be found in 2 Vent. 60; *Robinson's Ent.*, 171; *Winch's Ent.* 112-118; *Hob.* 34. See *infra* Chapter VII., for what will constitute an eviction, and how it may be set forth.

upon the plaintiff, in the first instance; it is not like actions on the covenants for seizin, in which "the defendant is called upon by suit to explain his title."¹

There is much conflict of authority and practice in this country as to the measure of damages for a breach of this covenant, as respects improvements and increased value of the subject of the purchase; and, as to this point, there is no distinction taken, and perhaps none exists, between the covenant for quiet enjoyment and that of warranty: the authorities upon this subject will therefore be found in the chapter on the latter covenant.²

¹ See *supra*, page 66.

² Chapter VII.

CHAPTER VI.

THE COVENANT FOR FURTHER ASSURANCE.

IN England this covenant is deemed of great importance, since it relates both to the title of the vendor, and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter.¹ It is, however, by no means extensively used in the United States, which would seem to be owing rather to habit, arising from the inartificial character of early conveyances, than from any want of usefulness in the covenant itself, or difficulty as to its application.

The covenant is in England generally set forth in the following form: "And also that he the said (vendor) and his heirs, and all persons whosoever lawfully or equitably and rightfully deriving or claiming any estate, right, title, trust, dower, jointure, charge or interest whatsoever, at law or in equity, of, in, or to the said premises, &c., or any part thereof, by, from, under, or in trust, for him, them, or any of them, shall and will, from time to time, and at all times hereafter, upon the reasonable request and at the costs and charges of the said (purchaser) his

¹ Platt on Covenants, 340.

heirs, appointees and assigns, make, do, execute, acknowledge and perfect, or cause or procure to be made, done, executed, acknowledged and perfected, all such further lawful and reasonable acts, deeds, conveyances and assurances in the law whatsoever, for the further, better, and more perfectly granting, releasing, vesting and confirming the said premises, &c., and every part thereof unto and to the use of the said (purchaser) his heirs, appointees and assigns forever, according to the true intent and meaning of these presents, as by the said purchaser, his heirs, appointees or assigns, or his or their counsel in the law shall be reasonably devised or advised and required, and be tendered to be made, done and executed.”¹

The use of such a covenant is obvious, particularly as respects relief to be given under it by a court of equity, upon a bill for its specific performance, to which, indeed, recourse is much more frequently had than to an action for damages in a court of law. In case the instrument of conveyance should be defectively executed, or the vendor's wife has not conveyed her dower, or in case a judgment be discovered, &c., upon a bill for specific performance of the covenant, the purchaser's title may be perfected, whereas under any of his other covenants for title his remedy would

¹ In this country, the covenant when employed is not unfrequently in the following form.

“And further, that the said party of the first part and his heirs, shall, and will, at any, and at all times hereafter, at the request and costs of the said party of the second part, his heirs and assigns, make and execute any and every other deed or assurance in the law, for the more sure and effectual conveyance of the said parcel of ground and premises with the appurtenances, to the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs or assigns, or his, their, or her counsel, learned in the law, shall or may devise, advise, or require.”

not be so complete.¹ In most instances, he might, indeed, have an action at law upon them, but this is frequently less satisfactory than the relief thus afforded by Equity.

By the term "reasonable acts," used in the above form, is meant such an act as the law will deem necessary and practicable; if it be an unnecessary act, that is, one which, if executed, would be useless, it is not such a reasonable act as the meaning of the covenant requires. Thus, where² the breach assigned was that the defendants had not directed trustees to do a certain act, the Court of Exchequer held that the direction not being either necessary to be made on the part of the defendant, or obligatory on the trustees, if made, was not an act within the meaning of the covenant.

Nor will one who has given such a covenant be held liable if its performance be prevented by the neglect of the covenantee, and where husband and wife, seized in right of the wife, covenanted that they had good right to assure the lands, and to make further assurance within seven years, and the wife died within that time, and her right descended to an infant, so as to render performance impossible, the Court held that it was the plaintiff's own fault; that the assurance should have been demanded in the lifetime of the wife, and that her decease, which prevented the performance of the covenant, was the act of God.³

¹ Thus Courts have refused to grant specific performance of covenants of warranty. *Watkins v. Owen*, 2 J. J. Marsh. 142; *Tuite v. Miller*, 10 Ohio, 382.

² *Warn v. Bickford*, 9 Price, 43.

³ *Nash v. Ashton*, T. Jones Rep. 195; *Skinner*, 42. "But Pollexfen, of the same side with Williams, showed another breach, viz.: that the wife

So the act required must be practicable. Thus, where in debt on a bond for the performance of a covenant to make such reasonable assurances as the purchase should devise, and the plaintiff required that a married woman should levy a fine, the defendant pleaded that the Justices of Assize refused to take the cognizance of the fine because she was not *compos mentis*, and the Court held that the condition was not broken.¹

In considering what acts may be reasonably required under this covenant, there appears no question but that the purchaser may, as of course, require a fine to be levied,² or a judgment or other incumbrance to be removed.³ Whether he could in England require the production of the prior title deeds seems not to have been settled.⁴

was under age at the time of the covenant, as appears by the verdict, she then had no power to convey the estate according to the covenant. And this was held a manifest breach, and therefore judgment given for the plaintiff, *nisi*."

¹ Pet and Callys' case, 1 Leon. 304. So in an anonymous case, Pasch. 25 Eliz. Moore, 124, where "le verity fuit que al temps del request, la feme fuit egrotant sic ut laborare non potuit. Et tout le Court sembleront que malady excusera cest obligation, car ne fuit reasonable request en temps quant la feme ne fuit able de traveller, et issint si la feme soit grossement enseint sic ut ne poit traveller."

² Middlemore v. Goodale, Cro. Car. 503; Boulney v. Centeys, Cro. Jac. 251; King v. Jones, 5 Taunton, 427.

³ Per Heath, J., in King v. Jones, 5 Taunt. 427; 2 Sug. Vend. 542.

⁴ Where in Fain v. Ayers, 2 Simon & Stuart, 533, a bill stated that the plaintiff had resold the property which he had purchased with a covenant for further assurance, and prayed either alternately, a new covenant to produce title deeds, or the actual production of the deeds themselves, a demurrer to the bill for want of equity was overruled. Vice Chancellor Leach said, "I do not think, that there has been a judicial decision upon the particular point, whether under a covenant for further assurance in a conveyance, a new deed of covenant to produce title deeds may be required. But whatever doubt there may be upon that point, this bill stating that the plaintiff has resold the property, prays alternately either a new deed of covenant to produce, or the actual production of the title deeds, to enable

"If the title prove bad," says Sir E. Sugden, "*and the defect can be supplied by the vendor*, the purchaser may file a bill in Equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under such a covenant, be compelled to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration."¹

In *Taylor v. Debar*,² "A purchaser of the crown lands, in the time of the late wars, sells part to the plaintiff, and covenants to make further assurance. He, on the King's restitution, for £300 had a lease for years made to him under the King's title. The decree was he should assign his term in the part he sold." So in a recent case,³ where one believing that he had the fee simple, subject to his mother's life

the plaintiff to show a marketable title upon his resale. The defendant's title deeds being the root of the plaintiff's title, and in that sense a sort of common property, (see *Barclay v. Raine*, 1 Sim. & Stuart, 449,) I strongly incline to think that the plaintiff has an equity to that extent; and I am informed that the Lord Chancellor has expressed an opinion to that effect."

But in *Hallett v. Middleton*, 2 Russell, 249, a case which occurred about the same time, where one had conveyed to trustees to sell, if the debts of a partnership in which he had been engaged should exceed a certain sum, and the trustees reciting that the debts did exceed that amount, conveyed to a purchaser by a deed in which the heir of this partner joined, with a covenant for further assurance, and the purchaser filed a bill, praying either for the production of the accounts, to show that the debts did exceed that amount, or for a covenant for their production; the bill was dismissed by Gifford, M. R., who said, "it was one of the most extraordinary attempts at relief that a court of Equity has witnessed. The covenant creates no obligations, in respect of which the documents should either be delivered to him, or deposited in a place of security, inasmuch as they are not part of his title." The precise point stated in the text was not, it will be observed, settled in either of these cases.

¹ 2 Sug. Vend. 541.

² 1 Chan. Cases, 274, cited by Sir E. Sugden; the case is again reported in 2 Ch. Cases, 212, in the same words.

³ *Smith v. Baker*, 1 Young & Collier's Ch. R. 223.

estate, conveyed it to trustees for the benefit of creditors, covenanting for title and for further assurance, it turned out that the mother had the fee simple, which on her death descended to him, and it was clearly held that he must be compelled to convey the after acquired estate.

The case of *Bensley v. Burdon*,¹ cannot, when examined, be said to be in conflict with this position. There, one reciting that he is entitled to an estate in remainder, charged it with an annuity and conveyed it by deed of lease and release to trustees to secure the payment of the annuity, covenanting for further assurance. He subsequently charged it with another annuity and conveyed it to another set of trustees, reciting the former deed. It turned out that he had at the time of these conveyances no estate whatever, but subsequently a life estate descended to him which he conveyed to the second annuitant. The first annuitant having become bankrupt, his assignees filed a bill against the second annuitant and both sets of trustees, praying that a deed might be executed by all necessary parties, for charging the life estate with the payment of the first annuity, but the bill was dismissed² by Vice Chancellor Leach, on the ground that the law had already given the complainants all that they asked by their bill, the first deed operating by way of estoppel as against the grantor, and those claiming under him with notice. This point had been treated at the bar by the counsel on both sides as too clear for argument, the law as to

¹ 2 Sim. & Stuart, 519.

² Though without costs, considering the nature of the defendant's title, and that upon the ground on which the Court proceeded the bill might have been demurred to.

the estoppel being considered as decidedly the other way, and so indeed it has since been held, although the decision in *Bensley v. Burdon* was affirmed by the Chancellor,¹ yet on the point of estoppel it has since been corrected.²

It was observed in the preceding chapter that the covenant for quiet enjoyment was formerly construed with much more latitude than it has received in more recent times, being once held to extend to the acts of all persons, whether claiming rightfully or wrongfully;³ and, on the other hand, rather a strict construction seems to have been formerly given to agreements "to convey by reasonable assurance," as upon such an agreement it has been held,⁴ that the vendor was not bound to insert any covenants, "although they be ordinary and reasonable, yet the agreement not being to make it with reasonable *covenants*, but only reasonable *assurance*, he is not bound to seal it, for it is not any part of the assurance, and the assurance may be without any covenants;" and in the *Touchstone*⁵ it is said, "if one be bound to make a feoffment to A upon request, in this case A must get a naked deed of feoffment, drawn without warranty or covenants, and tender it."⁶ It might have been perfectly proper to have held that an agreement to convey by reasonable assurance, would not justify

¹ At least in *Right v. Bucknell*, Lord Tenterden said, "the Lord Chancellor confirmed the judgment," 5 Russell's Ch. Rep. ; but the case does not seem to be reported in that volume.

² *Right v. Bucknell*, 2 Barn. & Adolph. 278; *Lloyd v. Lloyd*, 2 Connor v. Lawson, 592; in the latter case by Sir E. Sugden, who himself had, in *Bensley v. Burdon*, argued in favor of the estoppel. See an able article in the *London Jurist*, vol. 5, page 860 and 1170, and see *infra*, Ch. IX.

³ See page 147. ⁴ *Coles v. Kinder*, Cro. Jac. 571. ⁵ *Touchstone*, 168.

⁶ See also *Wye v. Throckmorton*, 2 Leon, 130; *Pudsey v. Newsam*, Yelv. 44.

the requisition of covenants extending beyond the acts of the covenantor, and those claiming under him, since in the absence of an express stipulation it would seem most reasonable that a man should only covenant against his own acts, or those of persons claiming under him;¹ but the decision just quoted, in going beyond this limitation, seems based upon narrow grounds. When we remember that, originally, warranty was a necessary incident of tenure, and that afterwards, when deeds were introduced, a warranty was implied without any clause to that effect, merely from the words which passed the estate, and that since the statute of *quia emptores* a warranty was inserted, as almost of course, in every conveyance of the fee,² it becomes difficult, on the score of authority or usage, to account for the decisions referred to. But the law seems to have experienced a reasonable change, and a distinction is every where taken between agreements to convey by reasonable assurance, which are held to carry with them a right to covenants for the title in the deed of conveyance, and a right to the insertion of these covenants in the deed of further assurance itself.³

It is at all events quite clear that the covenantor, if compellable to enter into any covenants in the deed of further assurance, is not, in the absence of an express agreement to the contrary, bound to covenant

¹ See Chapter XI.

² See Chapter I.

³ "Where the agreement is to convey an estate upon sale," says Sir E. Sugden, 2 Vendors, 545, "it admits of no doubt that the purchaser, both at law and in equity, would have a right to a conveyance with usual covenants, although nothing was expressed about covenants in the agreement: that would be supplied. But where the conveyance is really a further assurance, the purchaser must be supposed to have already obtained all such covenants for title as he was entitled to, and therefore could not require any new ones from the seller in the further assurance."

further than against his own acts;¹ but it would seem that out of abundant caution a stipulation to this effect is usually inserted, by way of qualification to the covenant.²

Some old authorities³ held that if the covenant be to make such assurance as the purchaser's counsel shall devise, the assurance must not be devised by the purchaser himself, though he be learned in the law, but by the form of the covenant, as usually expressed in modern times, the assurance may be either devised by the purchaser or his counsel. The most proper and usual course towards obtaining a fulfillment of the covenant, is for the purchaser to submit a case stated for the opinion of his counsel, which, when obtained, is, together with a draft of the intended assurance, submitted to the vendor.⁴

¹ *Lassels v. Catterton*, 1 Modern, 67.

² The form of a limited or qualified covenant is thus given in *Platt on Covenants*, 347: "So as such further assurances, or any of them, shall not contain or imply any other or more general covenants or warranty, on the part of the person or persons who shall be requested to make or execute the same, than for the acts, deeds, and defaults of himself, herself, and themselves, respectively, and his, her, and their heirs, executors, and administrators; and so as the person or persons who shall be requested to do such acts, or make such further assurances, shall not be compelled or compellable, for the purpose of making or doing the same, to go or travel from his, her, or their then dwelling or place of abode, or respective dwellings or places of abode." See 2 Chitty's Pleading, 543.

³ *Rosewell's case*, 5 Rep. 19 b; *Bennet's case*, Cro. Eliz. 9; *Baker v. Balstrode*, 2 Lev. 95.

⁴ The resolution in *Manser's case*, according to Coke's report, (2 Rep. 3 a) that "if the vendor is literate he is bound by law to seal and deliver the assurance presently upon request," and without time to consult with his counsel, seems by the report in *Moore*, 182, pl. 326, to be rather broadly laid down, and in *Bennet's case*, Cro. Eliz. 9, it is said that "B is not only to show him the assurance that he is to make, but is to permit him to read it and go to his own counsel to consider it." *Wotton v. Cooke*, 3 Dyer, 337 b; *Symes v. Smith*, W. Jones, 314; S. C. Cro. Car. 299; *Andrews v. Eddon*, 1 Anderson, 122; *Heron v. Tryne*, 2 Lord Raym. 750; *Miller v. Parsons*, 9 Johnson, 336.

It would seem that in suing upon this covenant at law, much particularity is required as to the form of the declaration.¹ Thus where² the defendant covenanted upon request by the testator to make further assurance to him, his heirs and assigns, and the breach assigned was that the plaintiff, as executrix, requested the execution of a release between the defendant and the plaintiff and one S. A. for the further assurance of the premises, on special demurrer the breach was considered badly assigned, as it was not shown what right the plaintiff had, or to whose use the release was to enure, or why S. A. was to be a party to it.

So in a case in New York,³ where upon a covenant that the defendant would, upon the reasonable request of the plaintiff, do and execute such further and other lawful assurances for the better and more effectually vesting and confirming the premises as by the plaintiff or his counsel should be reasonably devised, advised or required, the declaration averred that the defendant's wife would, on her husband's death, have a right of dower in the premises, and that the defendant had been requested by the plaintiff to execute a reasonable conveyance and assurance of the said right of dower, according to the true intent and meaning of the covenant. On demurrer, the Court held the breach badly assigned; that the plaintiff having devised the assurance was bound to give notice of it to the defendant, and allow him a reasonable time to consider of it. As no particular assurance was specified in the covenant, and none specified by

¹ A precedent for a declaration on this covenant will be found in 2 Chitty's Pleadings, 543.

² King v. Jones, 5 Taunton, 418.

³ Miller v. Parsons, 9 Johnson, 336.

the plaintiff, the defendant could not know what assurance was required.

In *Lewis v. Dymoke*,¹ one purchased a house which was the subject of a tenancy for life, with remainder to first and other sons in tail, and the tenant for life covenanted that the first son who should attain the age of twenty-one years should, at the request of the purchaser, well and effectually convey and assure the premises by such common recovery, fine or fines and other assurance as counsel should advise. In an action on this covenant the declaration averred the seizin and death of the covenantee, and the descent on, and seizin of the plaintiff as his heir, the attainment of the majority of the son, and the request of the plaintiff that a common recovery should be suffered. It was objected that there should have been an averment that the defendant had notice of the title having devolved upon the plaintiff, and also that it should appear that the suffering of the recovery was advised by counsel, of which the defendant had notice. But the Court of Common Pleas held, upon authority, the first averment unnecessary; that the plaintiff need only show all that may bring him within the words of the covenant, and that any grounds of exception must be shown by the covenantor. That as to the second objection, it was admitted by the deed that a common recovery was necessary at all events, and that the words "as counsel should advise" only referred to assurances other than a recovery. "If a covenant be that a party shall execute such assurances as counsel shall advise, the plaintiff must show what has been advised, but that is not the covenant the breach of which is complained of here."

¹ 2 Bingham, 105.

The distinction between these cases will be perceived to be, that in *King v. Jones* the declaration did not at all state the right of the plaintiff, and in *Miller v. Parsons* the covenant was differently framed.

The technical breach of this covenant occurs, it would seem, upon the neglect or refusal of the covenantor to execute the further assurance. Until such refusal there can be no question but that the covenant would run with the land, and be made available to the owner for the time being. Its capacity in this respect, and the question of who is the party to take advantage of its breach, is considered in another chapter.¹

For the reason that redress is usually sought on this covenant in Equity, there is little to guide us in considering the question of the measure of damages. In *King v. Jones*,² Mansfield, Ch. J., said, in the course of the argument, "In the present case the ancestor might have sued, and could have recovered the whole value of the estate if the other would not have conveyed; at this time of day there could have been no difficulty on that point;" but Heath, J., in delivering the opinion of the Court said, "The purchaser paid his purchase money relying on his vendor's covenant; he required him to perform it, but gave him time and did not sue him instantaneously for his neglect, but waited for the event, (the eviction.) It was wise to do so until the ultimate damage was sustained, for otherwise he could not have recovered the whole value;" and upon principle and analogy to the other covenants it is more than probable that the rule in

¹ See Chapter VIII.

² 5 Taunton, 418.

general is, that a mere refusal to execute the further assurance will not of itself entitle a plaintiff to more than nominal damages, unless in case it appear that by that very act the plaintiff has sustained the ultimate damage that may ever occur to him by reason of the refusal. Thus, if the wife of a vendor had not conveyed her dower, and his covenant had extended to procure its release, it would be unjust if the plaintiff were allowed to recover damages proportioned to what would be its value, since there might be a probability of the wife's dying in her husband's lifetime, in which case her dower could never be claimed, and the purchaser would have received a certain compensation for running the risk of a contingent injury.

It would not, however, be necessary for the purchaser to abide an eviction; and the same principles which have already been considered in treating of this subject of damages in connection with the covenant for seizin and against incumbrances may also be referred to here.

CHAPTER VII.

THE COVENANT OF WARRANTY.

It has been said from the bench,¹ that few subjects were so badly understood by courts and lawyers, as the action of covenant upon clauses of warranty. It may be doubted if, practically, the severity of this censure is deserved; as although the subject has never since its application to modern conveyancing received a connected and separate examination, yet the cases upon the subject exhibit far less want of harmony than might reasonably have been expected. The constant use of this covenant in conveyances, on this side of the Atlantic, gives to it an importance which deserves careful inquiry. Although sometimes it is used in addition to some or all of the covenants which we have been considering, yet it is not unfrequently, and in some States it is almost invariably,² the only express covenant employed.

¹ Per Catron, J., in *Randolph v. Meeks*, Mart. & Yerg. 61.

² "I can say with truth," said Lumpkin, J., in *Leary v. Durham*, 4 Georgia Rep. 601, "after a practice of more than a quarter of a century, that I never saw a deed containing, in so many words, definite and precise covenants of seizin—right to convey—for quiet enjoyment—against incumbrances, and for further assurance. These are all designed to be included in the general covenant of warranty of title against all claims." Such too appears to be the course of conveyancing generally in the Southern and Western States, as it is in Pennsylvania. *Stewart v. West*, 2 Harris, 336; *Caldwell v. Kirkpatrick*, 6 Ala. 61. See Chapter XI.

The origin and effect of the ancient common law warranty have already formed the subject of the first chapter, where its general character and incidents were endeavored to be sketched. It was there seen that warranty was, in its origin, one of the incidents of the feudal relation between the lord and vassal, and enured to the latter as a necessary consequence of, or return for, the homage by which the land was held; and its operation was twofold, in giving to the vassal the right to demand another fief, in case of the loss of that which he had before enjoyed, and also in repelling the lord from claiming the land itself, or any of its profits, except those which, under the feudal contract, were justly due to him. When warranty was thus implied in the creation of every fief, the right to its benefit was co-existent with the estate itself, and passed with it to the heirs of the feoffee.¹ But when, by the introduction of deeds and charters, a warranty was thus expressed in them in words,² although the estate might be given to the feoffee and his heirs, yet if there were "warranty to the feoffee only, without mentioning his heirs, there the warranty shall enure for life only, because it is taken strictly;"³ and while this was the rule as to the benefit of the warranty, it was equally so as to its burden, since if it were expressed merely by the word *warrantizo*, without adding *et heredes mei*, the warranty would endure only for the life of the warrantor, as says Coke, "an express warrantie shall never bind the heirs of him that maketh the war-

¹ Co. Litt. 384 b.

² *Ego et heredes mei warrantizatus*; and, says Littleton, § 733, "no other verbe in our law doth make a warrantie."

³ Dyer, 42 b.; Co. Litt. 47 a.

rantie, unless (as hath been said) they be named.”¹ Hence it appears that during the period when warranties were implied as incidents of tenure, their burden bound the warrantor and his heirs, and their benefit enured to the warrantee and his heirs, so long as the feudal relation between lord and vassal demanded from the latter the obligation of homage; but when warranties were “expressed by deed,” (as distinguished from “warranties in law,”) their burden or benefit passed no further than the words of the deed strictly authorized.

During the two centuries that elapsed between the passage of the statute *de donis*, and the decision in Taltarum’s case²—from the reign of Edward I. to that of Edward IV.—the whole subject of warranty was perplexed and entangled. It was during this period that collateral warranties were introduced as a means of barring estates tail, and the original and natural effect of a warranty, as being an assurance to the purchaser, was almost lost sight of, in comparison with its operation by way of rebutter. Hence it is that we find the sections of Littleton, who wrote shortly after Taltarum’s case, filled with matter which is not only unprofitable at the present day, but which even at the time when Lord Vaughan wrote seems to have been but little appreciated. It has been owing to this unfortunate distortion of what seems to have been a comparatively plain subject, that some misconception has, in later times, prevailed as to the operation of warranty as a remedy to the purchaser.

The practical means by which the latter might avail himself of a warranty were in fact simple.

¹ Co. Litt. 384 b. ; 1 Rep. 10; Fitz. Nat. Br. 312 a.

² 12 Ed. IV. c. 25. See *supra*, p. 23.

There were certain of the old common law forms of action, in which if one who had received a warranty were impleaded, he had the means, by virtue of a "*summoneas ad warrantizandum*," of bringing in his warrantor as the real party to the action, and thus make him defend the title. Some of the actions in which this process was allowed were *mort d'ancestor*, admeasurement of pasture, and writ of entry, and the process itself was termed voucher.¹ But there were also many actions by which a title might be assailed, such as an assise, writ of dower, *quare impedit*, &c., in which the warrantee had not the benefit of voucher. In these cases the warrantor had a right to bring a writ of *warrantia chartæ*,² wherein he gained the same end as in case of a voucher. The effect of thus bringing in the warrantor was, that the same judgment which deprived the warrantee of a part or the whole of what had been conveyed to him, also operated as a judgment in his favor against the warrantor, giving him a right to other lands of equal value to those which had been lost. Whether, in case the warrantor had no other lands, the warrantee could recover damages, as in case of a personal action, seems not to be very uniformly understood in later times. By the feudal law, as it existed on the continent, the warrantor was obliged to give his evicted vassal another fief of equal value, or if he had none, to pay him the value in money,³ and many of the cases in the Year Books seem to hold the same doctrine.⁴ Dr. Sullivan, however,⁵ goes to the extent of saying that "our law

¹ Vin. Abt. Vouch. Q.

² F. N. B. 134.

³ Butler's note to Co. Litt. 365 b.

⁴ 42 Edw. III. 7; 16 Hen. VII. 9; 9 Hen. VI. 21.

⁵ Sullivan's Lectures, 119.

went no further than to give a recompense of equal value in other lands."¹

But the writ of *warrantia chartæ* was also very frequently employed before the warrantee was impleaded in any action. In such case he brought his writ *quia timet implacitari*,² and if it were found that his apprehensions were not groundless, he was assured from future loss by means of a judgment *pro loco et tempore*. The effect of this judgment was, until the subsequent eviction of the warrantee, no more than a lien on the lands of his warrantor. It has been, probably, from this circumstance, that some contrariety of opinion may prevail as to the damages on a *warrantia chartæ*, as all the cases say that by a judgment *pro loco et tempore* the warrantee shall recover no damages,³ because as yet he has lost nothing. But

¹ For this position, 2 Fitzherbert's Nat. Brev. Warr. Ch. 135 H. may be an authority, if the citation from Brooke, Warr. Ch. 31, is not misapprehended.

² 24 Edw. III. 35.

"And a man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action, but yet the writ doth suppose that he is impleaded; and if the defendant appear and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his warranty, so as if the defendant be *after* impleaded and vouch him to warranty, and he entereth into the warranty, and pleadeth and loseth, and that the defendant recover in value, the defendant shall have in value of the lands against the vouchee, which he had at the time of the purchase of his *warrantia chartæ*, and therefore it is good policy to bring his *warrantia chartæ* against him before he be sued, to bind the lands of the vouchee which he had at that time," etc. Fitz. Nat. Br. 134. In the first sentence of this passage, the defendant first referred to, means the warrantor, that is, the defendant in the *warrantia chartæ*. Afterwards it means the warrantee, the defendant in the action brought to recover the land.

³ 24 Edw. III. 35; 2 Hen. IV. 14; 8 Edw. IV. 11; Br. Warr. Ch. 31. The following case from 2 Hen. IV. pl. 14, shows that a mere warranty did not bind the other lands of the warrantor, but that a judgment *pro loco et tempore* did. "A question was moved between the Justices of the Common Bench, of what effect judgment in *warrantia chartæ pro loco et tempore* is, and it was moved that a warranty was no more than a covenant, and that by such covenant a man should not bind land to be bound in value afterwards,

when the loss actually did occur, then, by means of a *scire facias* on this judgment, the warrantee was entitled to have execution of all the lands and tenements which the defendant had at the time of the judgment given,¹ provided, however, that in case of a suit brought after the judgment *pro loco et tempore*, the warrantee had, as by analogy to voucher, notified the warrantor and requested him to defend it.²

But the machinery both of voucher and of *warrantia chartæ* was only capable of being employed when the adverse title was one that affected a freehold interest in the lands which the warrantee had received; as, for instance, where a right of dower was sought to be recovered. But there were, of course, many instances in which the incumbrance or defect did not amount to the dignity of a freehold;

in whosoever hands they might come by purchase, or otherwise, without judgment in any action, for this would be too great a mischief . . . but otherwise it seems by the special judgment above." See also 12 Hen. IV. 12. The case is not quite correctly copied into Brooke, (War. Ch. pl. 8,) and is therefore somewhat differently rendered in the translation in Viner, War. Ch. M. 3.

It is much to be regretted that some patient industry has not as yet achieved a translation of the Year Books. Almost any reference to them at the present day is, perhaps with some reason, thought pedantic; and yet instances are frequent of cases being mis-quoted in later publications. References to the Year Books are not unfrequent in the late English Reports. Yet any one who has sought to trace in them a principle to its foundation, will be struck with the apparent contrarieties which they present, which would doubtless be to some extent explained could the contents of these volumes be presented in a more familiar shape.

¹ Vin. War. Ch. M. 4; Roll v. Osborne, Hob. 25; Fitzh. Nat. Br. 135.

² Per Markham, Ch. J., in 8 Edw. IV. 11. "If I recover from my warrantor a judgment *pro loco et tempore*, and then am impleaded in an action in which I cannot vouch, as for example, an assise or *scire facias*, it is proper for me to request him from whom I have thus recovered, to put in a plea for me, and thus give him notice of the action that is pending, as otherwise I shall not be allowed to have execution on my judgment." Dyer, 239, Fitz. Nat. Br. 134.

as, for example, where a prior lessee for years should enter upon the lands warranted. Here the warrantee could neither have voucher nor *warrantia chartæ*, for there was no loss of a freehold estate out of his land; it was merely a chattel interest, to recover which those actions would not lie.

But as it would be hard to leave the warrantee remediless in such case, the common law allowed him to use his warranty as a mere personal covenant, on which he should recover damages to the extent of his loss.¹

The only class of cases, however, in which warranty was thus employed as a personal covenant, was where the loss did not draw away a freehold. In every other case the remedy was by voucher or *warrantia chartæ*, in which the judgment was that the warrantee should recover in value lands equal to those which he had lost.

The peculiarities then of a warranty as distinguished

¹ This was decided in the case of *Pincumb v. Rudge*, reported in *Hobart*, 3; *Noy*, 131; *Yelveston*, 139; and affirmed on error, 1 *Rol.* 25.

“It was agreed by all the Judges in the Exchequer Chamber, that this action of covenant will lie; because that though the warranty was annexed to a freehold, yet the breach and impeaching was not of a freehold, but of a chattel, (that is to say) of a lease for years, for which there could neither be a voucher, rebutter, nor *warrantia chartæ*; so that though there had been a judgment in the *warrantia chartæ* in this case, yet neither upon entry, nor upon recovery in *eject. firmæ* upon this lease, there could be neither voucher, nor rebutter, nor value upon the *warrantia chartæ*; and therefore a real warranty is a covenant real, when the freehold is brought in question. But when a lease is in question, or any other loss that doth not draw away the freehold, it may be used as a personal covenant, whereupon damages may be recovered; so it is both a real and personal covenant to several ends and respects. And so it was adjudged for the defendant upon the writ of error.” So where the warranty was contained in a lease for years. “If a man lease for years with warranty, and the lessee is ousted by title, action of *covenant* lies against the lessor and against his heir also, if the ancestor had bound the heir to warranty.” *Brooke, Descent*, 50, *Covt.* 38.

from a covenant, may be thus summed up—First, as respects the process: this was either by voucher, commencing by a summons to warranty, and followed by a train of other writs,¹ or, where voucher was not admissible, by a *warrantia chartæ*.²

Secondly, as respects the judgment: this, in case of a voucher, or *warrantia chartæ* after suit brought on the adverse title, was that the warrantee should recover other lands of equal value, and the judgment in the adverse suit became also the judgment in favor of the warrantee against the warrantor. If the warrantee chose to proceed *before* adverse suit brought, and obtained judgment on the *warrantia chartæ*, this judgment, becoming a lien on all the lands of the warrantor, remained a security to the warrantee, until he should lose the lands warranted, when, and not before, he was entitled to execution upon the judgment.

One other difference remains to be noticed. We have seen that warranty, when expressed, bound only the heirs when they were named, and being a covenant real, could not, in its strict sense, when applied to a freehold, by any possibility bind executors or administrators. But the *covenant* of warranty bound the latter, even when they were not named in the deed, on the familiar principle that whenever a testator is himself bound by a covenant, his executor shall always be.³

These then were the principal differences between a warranty and a covenant.⁴ Their points of resemblance were,

¹ See them in the note to 2 Saunders, 32.

² See the form in Fitz. Nat. Br. 134.

³ Viner Cov. D; Touch. 178; Cro. Eliz. 553; 2 Wash. 153.

⁴ "There is a diversity," says Coke, (Co. Litt. 384 b.) "between a war-

First, that in case the warrantor had no other lands to render in value, it seems that the warrantee was allowed damages, which could be levied from the personal property; and

Secondly, where the estate conveyed to the warrantee, or the estate sought to be recovered from him, was less than freehold, the warranty was used as if it had been a personal covenant.

Both the warranty and the covenant of warranty are sometimes spoken of as "a covenant real," but this will not be understood as confounding them with each other. Where warranty was alluded to as a

ranty that is a covenant real, which bindeth the party to yield lands and tenements in recompense, and a covenant annexed to the land which is to yield but damages." In *Williamson v. Codrington*, 1 Ves. Sr. 511, where there was a settlement, on illegitimate children, of real estate in the West Indies and negroes, with a covenant to warrant and defend, Lord Hardwicke held that these words "must be construed in a larger sense than warranty in a strict legal sense; as large as defend." In *Jacocks' Lessee v. Gilliam*, 3 Murphy, 47, tenant in tail aliened with covenant of warranty, and it was argued that a discontinuance had been thus caused, and the issue in tail barred. "But," said Taylor, Ch. J., "the law has made a clear distinction between a covenant real and a covenant personal; and to a warranty alone in the original and proper sense of the term, has it imparted the effect of intercepting the descent to the heir, because he, and not the executor, is bound to warrant and secure the land to the covenantee (warrantee) and his heirs. The use and adoption of the form in which the ancient warranty is expressed, would indicate the intention of the parties to avail themselves of such remedies as appertain to the warranty only, and the change of that form will justify the reasonable inference that they designed to abide by the security which is afforded by covenant."

In this case it seemed to be supposed that a discontinuance necessarily barred the issue in tail. Such, however, is not the case. Although the issue might be obliged to bring an action in order to regain the possession, yet in that action there was nothing in the warranty of the ancestor since the statute *de donis*, to prevent a recovery. Butler's note to Co. Litt. 330. So, in the able tract of Mr. Preston, "On the effect of fines, &c., by tenant in tail," he says, "the issue are not barred unless there is a common recovery or fine with proclamation, or in some special cases, a warranty." Preston's Law Tracts, 29. See further as to the effect of a warranty by way of rebutter or estoppel when used in modern conveyances, Chapter IX.

covenant real, it was meant that lands instead of damages were, in the first instance, recoverable. Where the covenant of warranty was spoken of as a covenant real, it was so termed as distinguished from covenants which did not run with the land; in other words, the old distinction seems to have been, that warranty, which did not bind executors, whose effect was that of a specific performance, or at least a restitution in kind, and which yielded lands and not damages (at least in the first instance) as a recompense, was a covenant real, as distinguished from those which bound executors, on which damages alone were recovered, and which were, therefore, termed personal covenants. Then, as the ancient warranty fell into disuse, the covenant of warranty (which was, however, by no means frequently used in England) was classed with covenants to repair, to levy a fine, &c., which ran with the land, and which, though yielding damages, were sometimes called real covenants, as distinguished from those which were not entitled to run with the land.

From the comparative want of authority on the subject, it is difficult to trace with precision the introduction and use of the covenant of warranty, as distinguished from the old warranty itself. The earlier settlers of America left their mother country about the time when the modern system of law, which may be said to have had its rise at the end of the reign of Henry the Seventh, had, towards the latter part of that of Charles the Second, assumed something of a regular form.¹ Of the changes which marked this

¹ "The principal features of this alteration were the introduction of recoveries,—conveyances to uses,—the testamentary disposition by wills,—the abolition of military tenures,—the statute of frauds and perjuries,—

period, the discontinuance of real actions was one, and the emigration to America occurred about the time when their use had ceased to be frequent, and yet before the introduction into general practice of the covenants for title, which had been devised or at least arranged by Sir Orlando Bridgman during his retirement in the time of the Protectorate. The ancient warranty was nearly out of use, and the modern covenants were not fully in use, and at this period, if we may judge from the scanty authority on the subject, the covenant of warranty was introduced, and seemed to hold a middle ground between the old warranty on the one hand, and the more modern covenants on the other, and although superseded in England by the latter, it was brought to this country by our ancestors, and has since, throughout its breadth, been extensively used, and become, perhaps, the principal covenant for title.¹

But its precise nature and attributes seem not to have been very consistently agreed upon. On the one hand, it appears to have been very generally

the establishment of a regular system of equitable jurisdiction,—the discontinuance of real actions,—and the mode of trying titles to landed property by ejectment. There is no doubt that these have produced a material alteration in the jurisprudence of this country; but they have effected it, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects.”—Charles Butler’s *Reminiscences*, 116.

¹ In a learned, and, in general, accurate note to the case of *Foote v. Burnet*, 10 Ohio, 322. Mr. Wilcox, the reporter, seems to think that both the old warranty and the modern covenants, were used in our early conveyances. His language is, “Our ancestors, who emigrated just about the time the modern covenants for title were coming into use in the mother country, and before the warranty had been entirely abandoned, seem to have brought with them both the modern covenants and the warranty, and while the former alone were soon found to be a competent assurance of title in England, both the warranty and the modern covenants continued to be used in our early conveyances, and to have both come down together to our own time.”

thought that the modern covenant of warranty is neither more nor less than the old common law warranty, stripped of its voucher and *warrantia chartæ*, and turned into a personal covenant, and on the other, that it is synonymous with the modern covenant for quiet enjoyment. The first of these conclusions is far from correct; the second must be taken with some qualification. The origin of the former may be traced to an expression of Mr. Chief Justice Parsons, in the early case of *Gore v. Brazier*,¹ where he remarked, "The remedy to recover a recompense in other lands to the value existed very anciently, when the principal consideration received on the alienation was the services to be performed by the tenant. The remedy might then be proper, as any improvements of the land thus paid for in services, must redound wholly to the advantage of the tenant, as his services to the lord remained the same. But when lands were aliened for money, when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that, before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on a real covenant of warranty." The last sentence is, indeed, correct according to the letter, and might have been said to be true at any time previous; but if, as the whole context would seem to imply, the idea is meant to be conveyed that with the change of the times,

¹ 3 Mass. 544.

and the frequent alienation of land for money, the remedy on a warranty was optionally either money or land, and the warrantee might either bring covenant or *warrantia chartæ* at his pleasure, the position will be found difficult to sustain.¹

¹ This has been very clearly shown in a note to the case of *Pincombe v. Rudge*, in Mr. Justice Williams' American edition of Hobart's Reports, 3. The article is "from the pen of a distinguished jurist, whom the editor is not at liberty to name;" and has been thus inserted, somewhat abridged, in the 10th volume of the American Jurist, 119. "But Chief Justice Parsons, in *Gore v. Brazier*, 3 Mass. R. 523-545, held that a personal action would have lain in England upon a covenant of warranty annexed to a fee, and where the ouster was of the freehold by title paramount. And he cited, 1 Brownlow, 21; 2 id., 164-165, as in point. The case cited, I suppose, is *Waters v. The Dean of Norwich*; 1 Brownlow, 21, S. C.; 2 id., 158, &c. But there the plaintiff sued on a covenant to save harmless, &c. during the term, which was for life; and the breach assigned was a disturbance by an antecedent lease to one T. for years. So that the case was not different from that in Hobart, 3; the freehold not being brought in question. It is true that Lord Coke, who was Chief Justice, in giving his opinion, said, among other things, 'that covenant in law extends to lawful evictions, and to estates in being, and not where an estate is determined.' 'So also, he supposed, to express real covenants, which extend to freehold of inheritance, as warrant and defend, upon which a man cannot have an action if he be not ousted by one which hath title.' This last sentence is that upon which Chief Justice Parsons seems to have relied; but it is manifest that Lord Coke was referring to the difference between a covenant in law and an express covenant, and not to the cases in which covenant would lie on a warranty. According to the case of *Pincombe v. Rudge*, (Hob. 3,) there is no doubt that covenant would lie, if the ouster by title paramount was not of the freehold, but for a term of years only. For is it to be presumed that Lord Coke had any notion in his mind, that if the ouster was in fee, covenant would lie on a warranty? And the covenant in the case before the Court was not a warranty, but a covenant to save harmless and acquit. In short, equivalent to a covenant for quiet enjoyment. Besides, the case in Brownlow was decided in 10 Jac. 1; and that of *Pincombe v. Rudge*, was finally decided in the Exchequer Chamber, by all the judges in 11 Jac. 1. And therefore, if there be any discrepancy between them, the principle established by all the judges in the last case, is the true one. And it seems to me that there is a necessary implication in this last case against the doctrine of Chief Justice Parsons. At all events, the authority he relies on, does not support his dictum." The remainder of the note to the case of *Pincombe v. Rudge*, is from the pen of Mr. Justice Williams, and with the exception of a note by Mr. Wilcox, to *Foot v. Burnet*, 10 Ohio, 322, is the only

The expression of Mr. Chief Justice Parsons has, however, often been quoted as if settled law, and, in several cases it has been held that a personal action can, at the present day, be supported upon a warranty, as expressed in its ancient form.¹ This course of decision can certainly now do no harm, "and such a construction will no doubt correspond with the intention of the parties;" but when it is sought to be based upon old and well settled authority, it seems proper in discussing the nature of the subject matter, to refer to the discrepancy. Indeed, the distinction between a covenant of warranty and warranty itself, has been at times so overlooked, that it has even been seriously urged, that upon the former, even at the present day, nothing but a *warrantia chartæ* can be brought.²

But there is another and a more important distinction between the modern covenant and the ancient

instance in which the subjects of covenants for title is treated in a connected form.

¹ Allison v. Allison, 1 Yerger, 24; Booker v. Bell, 2 Bibb, 173; Townsend v. Morris, 6 Cowen, 127; Rickets v. Dickens, 1 Murph. 343.

² Stout v. Jackson, 2 Randolph, 148; (see three elaborate opinions in that case;) Tabb v. Binford, 4 Leigh, 132; Chapman v. Holmes, 5 Halsted, 23; see the remarks of Tilghman, Ch. J., in Jourdan v. Jourdan, 9 Serg. & Rawle, 276.

In Chapman v. Holmes, both the counsel and the Court seem to have overlooked the distinction between a warranty and a covenant; the counsel, in an elaborate and otherwise able argument, insisting that because voucher, &c., was the ancient remedy on the former, that it must still be so on the latter; and the Court, in deciding for the plaintiff, intimating that the tenant of the freehold always had his option to bring covenant, or resort to the real action. The case was too plain for argument, if the difference had been observed. A passage in Bac. Ab. Cov. C., that, "in the eviction of a freehold, no action of covenant will lie upon a warranty," was misquoted in 4 Johns. 11, by the addition of "a covenant of" warranty, and repeated in Chapman v. Holmes. In Townsend v. Morris, 6 Cowen, 123, there was more room for such an argument than in Chapman v. Holmes, for there was no covenant *in hæc verba*, but the form was as in the old charters.

warranty, than the mere form of the remedy. Even if the law were as Mr. Chief Justice Parsons seemed to suppose, that, with the advance of time, warranty became gradually employed as a personal covenant, (and such, it will be remembered, was always the case when the warranty was annexed to an estate less than freehold), yet, as respects the breach, there was an obvious distinction between the warranty when thus applied as a personal covenant, and a modern covenant of warranty itself. The former had a much wider scope than has been given to the latter. We have no reason to suppose that there was a different rule as to the breach of a warranty, when annexed to a leasehold, and when annexed to a freehold. Now, as respects the former, the covenant implied by the word *demisi* carried with it not only a covenant for quiet enjoyment, but also that of a power to demise, and an eviction was not always necessary to its breach.¹ The case of *Holder v. Taylor*,² indeed, seems to make a difference between the breach of the covenant of warranty and that for quiet enjoyment, while it recognizes no difference between a covenant of warranty of a leasehold and of a freehold. "The word *demisi* imports a power of letting, as *dedi* a power of giving;" and although on the latter word a *warrantia chartæ* was the proper remedy, and on the former an action of covenant, yet this makes no difference in the principle. Warranty, when annexed to a freehold, clearly possessed some of the properties of a covenant for seizin, or for right to convey, as the admirable provisions of the common law, as to the

¹ *Style v. Hearnings*, Cro. Jac. 73; 1 Saund. 322, note; *Holder v. Taylor*, Hob. 12; *Line v. Stephenson*, 5 Bing. N. C. 183; *Crouch v. Fowle*, 9 N. Hamp. 322; *Grannis v. Clark*, 8 Cowen, 36.

² *Hobart*, 12.

judgment *pro loco et tempore*, abundantly testify. And even when used as a personal covenant, by reason of being annexed to a leasehold, it seems still to have preserved these properties, though the means of enforcing them were different.

But at the present day a covenant of warranty does not contain these properties. It is held generally throughout the cases that a breach of this covenant will be caused only by an eviction, "or something equivalent to it;" and, as was said by Kennedy, J., in *Patton v. McFarlane*,¹ "if a recovery could be supported upon it without either allegation or proof of an eviction, it would, in effect, be deciding that the covenant of warranty contains within it each of the five covenants for title, which would be a novel idea for conveyancers and professional men."

"The modern covenant of warranty," said Gibson, Ch. J., in the recent case of *Stewart v. West*,² "differs from the ancient warranty, not because the latter bound the feoffor to defend the land, but because it bound him to render, not damages, but a recompense in kind for a breach of it. The form of the writ, as well as the nature of the recompense in value, was different, but the measure of the obligation was the same. The feoffor was bound by his warranty to defend the land; the grantor is bound by his covenant to do as much, and no more, by defending the grantee from eviction on a superior title. By reason of its straitness, even this modern covenant of warranty has given place, in English conveyances, to the common covenants for title against particular defects, which it does not reach. In Pennsylvania, it has

¹ 3 Penn. R. 422.

² 2 Harris, Pa. 338.

been retained by unprofessed scriveners as a nostrum supposed to contain the virtues of the whole five; but its potency has not been recognized by the bench. The writ of *warrantia chartæ* was founded on an assize, or a writ of entry in the nature of an assize, brought against the feoffee; and the covenant of the feoffor was to warrant the land by defending the action—the modern writ of covenant is brought against the grantor to recover damages for a failure to do so. The *gravamen*, therefore, is not the defect of title, but the eviction consequent on it.”¹

¹ The author may be excused for referring in this connection to a note to the case of *Paxton v. Lefferts*, 3 Rawle, 68; from the pen of the father of the reporter, in which the difference between the warranty and the covenant is adverted to. “Warranty in its original form has long been abolished, both here and in England. The more plain and pliable form of covenant has been substituted. The grantor for himself, his heirs, &c., covenants with the grantee, his heirs and assigns, that he and his heirs, executors and administrators, will warrant and defend the premises conveyed, against himself, his heirs, &c., either generally or specially, as the parties agree. This is *prima facie* a covenant to do what in the old form was expressly done, and it might admit of a curious construction. If, by the warranty in its original nature, the warrantor was obliged to render land only, the covenantor might, perhaps, be entitled to tender land as a compliance with his covenant, and might also avail himself of all the niceties and subtleties which characterized the ancient doctrine.

“It is true, that in some cases, damages were also recoverable by the warrantee. If a man be impleaded in assize, &c., and he brings a writ of *warrantia chartæ*, if the plaintiff recover his warranty, he shall recover his damages, and also to have the value of the land lost: *Fitz. Nat. Brev.* 315.

“But it would seem that the same rule did not take place, if the warrantor was vouched, and not sued by *warrantia chartæ*: *Br. Warr. Chart.* 31.

“We have no reason to believe, that, in this State, a covenantor ever attempted to discharge himself of the covenant to warrant and defend, by pleading that he was always ready to convey lands of equal value, or by showing that he had no notice of the eviction, and no demand of other land, &c. On the contrary, the covenant like all other covenants, has always been held to sound in damages merely, which after judgment, may be recovered out of the personal or real estate, as in other cases. If, indeed, the covenant admitted of such a construction, little advantage would be gained by it. In the case of *Williamson v. Codrington*, 1 Ves. 510, which

Although, therefore, it has been often urged in cases of hardship that the modern covenant of warranty should, in its application, do more than protect against a mere ouster of the possession, and should be made to partake of the nature and attributes of a covenant for seizin or of right to convey, yet such a construction has been almost universally denied, and it is well settled that a covenant of warranty cannot at the present day be construed so as to import a covenant for seizin, or of right to convey.¹

In South Carolina, indeed, a course of decision, which does not seem to have been recognized or

was a voluntary settlement on illegitimate children, of real and personal estate, with a covenant to warrant and defend, Lord Hardwicke held, that the word warrant must be construed in a larger sense than warranty in its strict legal sense; 'as large as defend.' There being personal property included in the covenant was adverted to by his lordship, but in reference to the real estate, the distinction was also taken. And the course of decision may, we think, be considered as now settled, that although the word warrant be introduced, yet the emphatical part of the covenant is to defend.^a See Kent's Commentaries on American Law, vol. iv., p. 457; in which the 'learned opinion' of Judge Duncan, 11 Sergt. & Rawle, 109, is cited, with the praise it deserves.

The result on the whole seems to be, that a covenant to warrant and defend, is to be construed a covenant running with the land, to defend the covenantee, his heirs and assigns; and that it precludes the grantor and all his heirs and assigns (not merely the heir at common law,) from claiming it; and binds all his estate, real and personal, in case of eviction by a stranger, to the amount of the damages sustained."

¹ Caldwell v. Kirkpatrick, 6 Alab. 62; Allison v. Allison, 1 Yerger, 25; Crutcher v. Stump, 5 Haywood, 100; (overruling, said Catron, J., in Randolph v. Meeks, Mart. & Yerg. 61, the case of Talbot v. Bedford's heirs, Cooke, 447, where Overton, J., had said, "the modern covenant to warrant and defend is inclusive of a covenant of seizin of an indefeasible estate, and of a right to convey, and as to the mode of redress, of quiet enjoyment.") Whitty v. Hightower, 12 Smedes & Marsh. 476; Griffin v. Fairbrother, 1 Fairf. 96; Vanderkar v. Vanderkar, 11 Johns. 122; Greenvault v. Davis, 4 Hill, 643; Clark v. McAnulty, 3 Serg. & Rawle, 364.

^a It was otherwise, however, by the old law, as Littleton says, (§ 733;) "it seemeth that this word (defend,) hath not the effect of warrantie, nor comprehendeth the cause of warrantie." See *infra*, page 197, and note.

adopted beyond the limits of that State, has adopted a different rule;¹ and in Ohio, statutory provisions on the subject formerly existed which have since been repealed.

It may be then safely said that the modern covenant of warranty is not the common law warranty, stripped of its peculiar forms of remedy, and turned into a personal covenant, inasmuch as warranty, whether annexed to a leasehold or a freehold, whether used as a personal covenant or otherwise, imported a right and a power of granting which is denied to the covenant now in use.

Nor, on the other hand, is it strictly accurate to say that it is synonymous with the covenant for quiet enjoyment. "It differs from it in this," said Gibson,

¹ The rule was thus stated in South Carolina, by Earle, J., in *Moore v. Lanham*, 3 Hill, 304, "The covenant of warranty has always been considered as broken, wherever a paramount title could be shown in another; and it has been uniformly held, that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction: *Pringle v. The Executors of Whitten*, 1 Bay, 254; *Administrators of Bell v. The Administrators of Higgins*, id., 326; *Sumter v. Welch*, 2 id., 558; *Champness v. Johnson*, 1809; *Johnson v. Viscon*, 1811; *Furman v. Elmore*, 1812; *McKay v. Collins*, 1 N. & McC. 186." The rule as to the covenant for quiet enjoyment seems to be different: *Singleton v. Allen*, 2 Strobhart's Eq. R. 173.

² "The insecurity of title to real estate in the Virginia military district," says Mr. Wilcox the reporter, in a note to *Foote v. Burnet*, 10 Ohio, 328, "is said to have given rise to a common practice there, of using no other covenant than the general warranty, on the ground that the grantor cannot be made liable on that covenant till actual eviction. The occupants of some large surveys in that district who found themselves in quiet possession, but without any title, and so could neither improve the lands nor sell them, made application to the Legislature of Ohio, and in 1815 a statute was passed, undertaking to give a grantee with a covenant of warranty, a remedy before eviction. The Act is said to have been so inartificially penned as to be incapable of any reasonable construction. It was repealed in 1831: *Chase's Laws*, 855, 1906; see 1 Ohio Rep. 389; 2 id. 346; 3 id. 525."

Ch. J.,¹ "that the latter is broken by the very commencement of an action on the better title." This remark must be applied to the covenant for quiet enjoyment as usually expressed at length in English conveyances, in which "any let, suit, interruption, disturbance," &c., is expressly covenanted against. Where, as is often the case in this country, the latter covenant is briefly expressed by the words "that the said (grantee) and his heirs and assigns shall quietly enjoy the premises," &c., the remark of the learned Chief Justice would lose its application, as the weight of American authority is decisive that to cause a breach of a covenant thus expressed, an eviction or something equivalent to it is indispensable.

There is another distinction to be observed between the covenant of warranty and that for quiet enjoyment, growing from the peculiar property attributed in many States to the former covenant of passing an after acquired estate by operation of the doctrine of estoppel.² Such an efficacy does not seem to be attributed to the latter covenant.

Nor does it seem to be definitely settled, at least in this country, whether the party entitled to the benefit of a covenant for quiet enjoyment can vouch or notify the party bound by that covenant in the same manner as if the covenant were one of warranty.

But, with these exceptions, it may be generally said that in the United States, the covenants of warranty and for quiet enjoyment are treated as synonymous. The same concurrence of circumstances seems necessary to their breach, they equally possess the capacity

¹ *Stewart v. West*, 2 Harris, (Pa.) 338.

² See Chapter IX.

for running with the land, and the rules as to their measure of damages is the same as to both.

The covenant of warranty as believed to be generally expressed, is in the following form :

“ That he the said (grantor) and his heirs, all and singular, the messuages and tenements, &c., hereby granted and mentioned or intended so to be, with the appurtenances, unto the said (grantee) his heirs and assigns, against him the said (grantor) and his heirs, and against all and every other person or persons lawfully claiming or to claim the same, or any part thereof, shall and will, by these presents, warrant and forever defend.”

When the covenant is to be a limited one, the words “by, from or under him, them or any of them,” should be inserted after the words “or any part thereof.”

In examining the expression of this covenant, its resemblance to ancient form will at once be perceived. From what is said by Littleton¹ we may infer that these words “warrant and forever defend” were those frequently, if not customarily, inserted in the creation of a warranty, although it does not appear that the word “defend” added any additional force, as “it seemeth that it hath not the effect of warrantie nor comprehendeth the cause of warrantie.”² The form, however, “warrant and forever

¹ § 733.

² “Of this,” says Coke, (Co. Litt. 382 b,) “Bracton writeth in this manner: Et ego et haeredes mei warrantizabimus tali et haeredibus suis tantum vel tali et haeribus et assignatis et haeredibus assignatorum, et eorum haeredibus, et acquietabimus et defendemus eos totam terram illam cum pertinentiis contra omnes gentes, &c. Per hoc autem quod dicit (ego et haeredes mei) obligat se et haeredes ad warrantiam propinquos, et remotos, praesentes et futuros, et succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenementum

defend," seems to have got into general use, expressed sometimes in Latin and sometimes in English, and to have descended to the present time.

Apart from the important word "warrant," the covenant as expressed above would seem to be no more than an engagement that it should bar the covenantor and his heirs from ever claiming the estate, and that he and they should undertake to defend it when assailed by paramount title.¹ The latter was, indeed, one of the consequences of a warranty and its effect in this respect has been continued, though with modifications, down to the present time. Before proceeding, then, to inquire into what will occasion a breach of this covenant by what is generally termed an "eviction," it seems proper to consider in the first place the right of the covenantee to cast the labor and responsibility of the defence upon his covenantor.

The ancient practice of vouching to warranty has already been referred to. In analogy to that practice it is well settled in this country,² at the present day,

in possessione rei date et assignatos suos et eorum haeredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat se et haeredes suos ad acquietandum si quis plus petierit servitii vel aliud servitium quam in carta donationis continetur. Per hoc autem quod dicit (defendemus) obligat se et haeredes suos ad defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis." "Hereby, (continues Coke,) it appears that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as Ego et haeredes mei warrantizabimus, &c., in Latin, do create a warrantie, so I and my heirs shall warrant, &c., in English, doth create a warrantie also."

¹ Stewart v. West, 2 Harris (Pa.), 338.

² Pomeroy v. Partington, 3 Term R. 665, was an action upon "a covenant warranting title" in a lease. In a note to page 668, the reporter says "a preliminary objection was taken, viz.: that the defendants were estopped from insisting on the title of M. G., because he had notice of the ejectment brought against the plaintiff, and neglected to defend his title; but as the judgment of the Court was founded on the principal question only, it is

in most, if not all of the States, that, in general, upon suit being brought upon paramount title against one who is entitled to the benefit of a covenant of warranty, he can by giving proper notice of this action to the party bound by that covenant, and requiring him to defend it, relieve himself from the burden of being obliged afterwards to prove, in the action on the covenant of warranty, the validity of the title of the adverse claimant.¹

Cases have, at times, been presented in which the covenantee having, in the first instance, failed to acquire the possession of the subject of the purchase, and having brought suit upon the title conveyed by the covenantor, has notified the latter to appear and prosecute that suit, and in the event of his failure to do so, has sought to make the judgment conclusive upon him. In a recent case, in Tennessee,² the right of the covenantee thus to bind his covenantor was denied. It was said that provision was made by law for making the covenantor the *defendant* in the

thought unnecessary to enter into this and other minute points which were stated in the course of the argument." The practice of giving notice of an adverse suit, prevails, however, at the present day. See *Duffield v. Scott*, 3 Term R. 377; *Smith v. Compton*, 3 Barn. & Adolph. 407.

¹ *Swenk v. Stout*, 2 Yeates, 470; *Bender v. Fromberger*, 4 Dallas, 436; *Leather v. Poulteny*, 4 Binn. 356; *Collingwood v. Irwin*, 3 Watts, 310; *Ives v. Niles*, 5 id. 323; *Paul v. Witman*, 3 Watts & Serg. 409; *Williams v. Weatherbee*, 2 Aiken 329; *Park v. Bates*, 12 Vermont, 381; *Pitkins v. Leavitt*, 13 id. 379; *Brown v. Taylor*, id. 631; *Hamilton v. Cutts*, 4 Mass. 353; *Cooper v. Watson*, 10 Wendell, 205; *Miner v. Clark*, 15 Wend. 427; *Kelly v. The Dutch Church*, 2 Hill, 105; *Morris v. Rowan*, 2 Harrison, 307; *Wilson v. McElwee*, 1 Strobbart, 65; *King v. Kerr*, 5 Ohio, 158; *Chapman v. Holmes*, 5 Halst. 20; *Brooker v. Bell*, 3 Bibb, 173; *Prewitt v. Kempton*, id. 282; *Cox's heirs v. Stroud's heirs*, 4 id. 4; *Davis v. Wilbourne*, 1 Hill, (S. C.) 28; *Middleton v. Thompson*, 1 Spears, 67; *Graham v. Tankerly*, 15 Alab. 644; *Fields v. Hunter*, 8 Missouri, 131; see *Duffield v. Scott*, 3 Term Rep. 376; and 2 American Leading Cases, 343, note to U. States v. Howell.

² *Ferrel v. Alder*, 8 Humph. 44.

adverse action, but that no precedent could be found in which the converse of the rule was applied in making the covenantor a *plaintiff*. The question of title was therefore considered still an open one in the action on the covenant. But in Vermont the law was differently considered.¹

The question which hence arises is, in the first place, what will constitute such a "proper notice" (or voucher, as it is still sometimes called) as those cases require. By the common law there was a regular writ, a *summonas ad warrantizandum*, "whereupon if the sheriff returned that the vouchee is summoned and he make default, then a *magne cape ad valentiam* is awarded," &c.;² but these writs have long become obsolete.³

In Pennsylvania it has been held⁴ that "to have the effect of depriving the warrantor of the right to show title, the notice should be unequivocal, certain, and explicit; a knowledge of the action, and a notice to attend the trial will not do, unless it is attended

¹ In *Park v. Bates*, 12 Verm. 361, the question was passed over without particular notice; but in *Pitkin v. Leavitt*, 13 Verm. 379, and *Brown v. Taylor*, id. 637, it was decided, that not only could the covenantee, by a proper notice, bring in his covenantor as a defendant, but that the converse of the rule also held good. So, by the Louisiana Code, "When the purchaser is himself obliged to commence judicial proceedings against a person disturbing his possession, he ought to notify his vendor of the action which he is commencing; and the vendor, whether he undertake to conduct the suit for him or not, is obliged to indemnify fully, in case of condemnation." Art. 2495.

² Co. Litt. 101.

³ In actions where voucher was not admissible, the practice was not unlike our own, for, says Markham, Ch. J., in Year Book 8 Edw. IV. 11, "If I recover from my warrantor a judgment *pro loco et tempore*, and then am impleaded in an action in which I cannot vouch, as an assize or *scire facias*, it is competent for me to request him from whom I have thus recovered, to put in a plea for me, and thus give him notice of the action that is pending, as otherwise I shall not be allowed to have execution on my judgment."

⁴ *Paul v. Witman*, 3 Watts & Serg. 410.

with express notice that he will be required to defend the title."

From this and the expression also used, "the notices here were not produced;" &c., it is to be inferred that the notice should be written; but this has been decided in New York,¹ not to be necessary. It was said "A parol notice gives the information to the grantor quite as well as a written one, and as there is no technical rule requiring such a notice to be in writing, no writing is necessary." From this, however, Bronson, J., dissented, saying, "This is not like a notice which will sometimes affect the title of a party by showing it tainted with fraud. In these cases notice means only knowledge of a particular fact, . . . and in general it is a matter of no moment in what form the information was received, or from what source it was derived. But here the notice, if it is to have any effect, is in itself a legal proceeding. It advises the warrantor that the title which he professed to grant is called in question," and after referring to the old practice of voucher by a writ of summons, proceeds, "as, in the one case, the right could only be asserted by means of a writ served by a public officer, he ought not, in the other, to be prejudiced by any thing less definite and formal than a writing which will advise him of what has been done, and what he is required to do;" and the views here expressed, while conducive to certainty in a matter whose effect is that of being conclusive upon a question of title, is clearly supported by analogy to the practice whence it springs; and if the decision be

¹ *Miner v. Clark*, 15 Wend. 427; notwithstanding it had been generally said in *Gilbert v. The Turnpike Company*, 3 Johns. Cas. 108, and *In re Cooper*, 15 Johns. 533, "A notice in legal proceedings means a written notice."

correct of a recent case in Vermont,¹ that in case of the death of the covenantor no further notice need be given to his representatives, great hardship might ensue, as a verbal message leaves no trace behind it, while, if written, something might still be in existence to warn or notify them.

In considering in the next place the *effect* of a notice, it seems to be settled that when the plaintiff in the action of covenant has produced evidence sufficient to satisfy the court that the notice was properly given in all respects, the validity of the adverse title cannot be inquired into by the defendant (except under the authority of *Kelly v. the Dutch Church*,² to show that it may have been derived from the covenantee himself). The question of notice is, however, to some extent, it would appear, a question for the jury. Although it is the province of the Court to determine what is and what is not a proper and sufficient notice as to time³ and certainty, yet

¹ *Brown v. Taylor*, 13 Verm. 631.

² 2 Hill, 105. See *infra*, page 206 and note.

³ It is hardly necessary to observe, that the judgment would not be conclusive upon the party bound by the covenant, if the notice were not given in reasonable time. The following remarks of Johnson, J., in *Davis v. Wilbourne*, 1 Hill (S.C.) Rep. 28, as to the local rules on this subject in South Carolina, were approvingly quoted in *Middleton v. Thompson*, 1 Speers, 69. "Notice in cases within the summary jurisdiction, should be given at or before the return of the process. In cases within the general jurisdiction, notice at any time before the expiration of the rule to plead. The object is to enable the warrantor to come in and defend his title. He ought therefore, to have a reasonable time to prepare for it, and the time which the law allows to a defendant, furnishes perhaps the safest rule. In the first class of cases however, the process might be served on the last hour of the last day before the return, so as to render the service of the notice impracticable before the return. In these cases, notice within a reasonable time afterwards, would be all that could be expected. So, where the warrantee has entered an appearance and put in his plea to the merits, I should think that notice even after the continuance, if the warrantor had time to prepare evidence for the trial, would be sufficient."

the fact of its reception seems to be within the province of the jury, except in the single case where the party bound by the covenant is made a party, or has placed himself upon the record of the adverse suit.¹

¹ Such at least was the determination in *Collingwood v. Irwin*, 3 Watts, 310, where the former had conveyed to the latter with covenant of warranty, and the latter had been dispossessed, under a judgment in ejectment obtained against him by one Robinson. "The third proposition," said Kennedy, J., who delivered the opinion of the Court, "offered to be proved was, that the title of Irwin to the land under the deed of conveyance, made to him by the plaintiff in error, was better than that of Robinson's under which he was evicted from the land. This testimony was clearly admissible; for the plaintiff in error was no party on the record to the judgment in ejectment, under which Irwin was turned out of possession of the land. The judgment in ejectment was therefore only *prima facie* evidence, as against the plaintiff in error, of Robinson's title to the land being better than that of Irwin's: but it is alleged that the plaintiff in error had notice of the commencement and pendency of the action of ejectment, and is therefore, concluded by the judgment rendered in it in favor of Robinson's title. Supposing this to be so, how does it appear that he had such notice? Certainly not by any exhibition of the record of the action of ejectment, and the judgment given in it: because, as already observed, he is not a party on the record of it; neither does it appear by any admission of his, placed upon the record of this suit. Whether he had such notice or not, was then a matter *in pais*, and became a question of fact, to be decided by the jury, and not by the Court; but the Court, by rejecting the evidence on this ground must necessarily have decided on the fact, that the plaintiff in error had such notice. Under this point of view, I apprehend the Court erred; for even in case evidence of a regular notice from Irwin to Collingwood of the action of ejectment being brought against him, with a request to appear and defend against it, had been given by Irwin, still as long as such notice and request were not admitted by Collingwood, it was the duty of the Court below to have admitted the evidence in regard to the title to the land, and afterwards to have directed the jury that if, from the evidence, they believed that Collingwood was notified by Irwin or his attorney, of the action of the ejectment being brought, and was requested likewise to appear and defend against it, they were to consider him bound and concluded by the judgment rendered in it; and whether Irwin had a better title to the land than Robinson or not, was a question which they could not decide, according to any opinion of their own, which they might form by an examination of their respective titles, but were bound to decide it according to the judgment given upon it in the action of ejectment."

As, therefore, it did not appear that the notice in this case, was as unequivocal, certain, and explicit, as it was afterwards said in *Paul v. Witman*,

In fact, unless the party bound by the covenant is so notified or vouched that he becomes, either actually or constructively, the party to the suit by which the land is sought to be recovered from the covenantee, there is no room for the application of the rule that the judgment of a court of competent jurisdiction cannot be inquired into collaterally, for the exception is as well settled as the rule itself, that the rule applies only to those who are said to be parties, or privies to the action. Where the covenantor is properly notified he becomes the latter, if not the former.¹ Where he is not thus notified the rule loses its application.

But the mere fact of making a notice of an adverse suit conclusive upon a covenantor, in a subsequent action against him, might, in many cases, work extreme injustice. Evidence of the title under which the recovery was had might not, and in most cases it is presumed would not appear upon the record, and yet that title might be one derived from the covenantee himself, subsequent to the purchase. To exclude evidence of this, notwithstanding a notice, would be clearly wrong.² The only question which

3 Watts & Serg. 410, that a notice ought to be, but was in some degree calculated to mislead, it was held that the question of title was fairly open to be decided, according to the whole evidence which might have been given at the trial by both parties.

¹ Paul v. Witman, 3 Watts & Serg. 410.

² Booker v. Bell, 3 Bibb, 175; Pitkin v. Leavitt, 13 Verm. 384; Wilson v. McElwee, 1 Strobhart, 66.

The following remarks of Wardlow, J., in *Middleton v. Thompson*, 1 Spears, 73, are of general application, though contained in a dissenting opinion. "In many cases, where a record of judgment is not proof of the truth of the matters recorded, it is evidence of its own existence, and of the legal consequences thence deducible. Hence, in cases of indemnity, the judgment showing a recovery against the indemnified, has been admitted as evidence of his loss, both as to the extent and as to his legal liability; but

therefore arises is as to the burden of proof. On whom is this to be thrown, when the record does not on its face set forth the title?

So far as the plaintiff in his action on the covenant, must, notwithstanding a notice given by him, affirmatively show by evidence, *dehors* the record, that the recovery against him was under a title not derived from himself, the question admits of easy solution. It will be remembered that in a declaration for a

notice to the person bound to indemnify, is usually referred to as strengthening the evidence as to competency as well as effect. See *Duffield v. Scott*, 3 Term Rep. 374; *Clark v. Carrington*, 7 Cranch, 322; *Kip v. Brigham*, 7 Johns. 170. By analogy to such cases, and in imitation of the voucher under the ancient warranty, the modern practice of giving notice to one who is bound in a covenant running with the land, seems to have grown up, and to have been gradually extended to all cases of covenants to warrant either land or personalty, and to all cases where recovery ever will be sought by one who has been sued, in the event of recovery against him. The cases on the subject are mostly American, because of the much more frequent occasion for the practice in this country. The principal cases I have consulted, to some of which I will hereafter refer, are *Bender v. Fromberger*, 4 Dall. 436, note; *Leather v. Pultney*, 4 Bin. 352; *Hamilton v. Cutts*, 4 Mass. 352; *Blasdale v. Babcock*, 1 Johns. R. 517; *Waldo v. Long*, 7 Johns. 174; *Sanders v. Hamilton*, 2 Hay, 226-282: and in our own State, *Goodwyn v. Taylor*, 2 Brev. 171; *Whitmore v. Casey*, 2 id., 424; *Bond's Ads. v. Ward*, 1 N. & M'C. 201; *Davis v. Wilbourn*, 1 Hill, 29; and the MS. case of *Allen v. Roundtree*, Columbia, May Term, 1832, Book 5, p. 393. To give the vendee the advantage of the warrantor's information about the title, and to save as well the trouble and expense of two trials of the same matter, as the confusion and injustice which would result from conflicting verdicts on the same evidence, the recovery against the vendee is admitted as evidence for him in his action against the vendor with warranty, if the vendor had reasonable notice of the suit, and the validity of the title conveyed by him was tried; more especially if the vendor assisted in the defence. The failure of the warrantor's efforts to defend the suit, is evidence of a breach of his undertaking to warrant and defend the title conveyed by him, as perhaps is his neglect of notice to defend. According to our own decisions, by the proper notice, the warrantor has been made privy to the suit, and is concluded by a judgment for the plaintiff, from disputing what such judgment ascertains, that the plaintiff had a title better than the defendants; and this judgment, with proof of the notice to the warrantor, and proof that (as said in *Davis v. Wilbourn*,) his title was in issue, will be conclusive that the plaintiff's title was better than the one which was warranted."

breach of the covenant for quiet enjoyment it is not merely necessary to allege that the eviction was made under paramount title, but that there must be added, "existing before and at the time of the conveyance to the plaintiff," as the eviction might be under a paramount title, but one which had been derived from the plaintiff himself, for which, of course, his covenantor would not be responsible.¹ The same principle is applied to the doctrine of notice. Beyond this point it does not seem necessary for the plaintiff to go. Where he has given a sufficient notice, it is believed to be enough if it be shown that the title under which the adverse judgment was obtained was not one derived from himself.²

¹ See, *supra*, page 161

² As was held at an early day, in *Phelps v. Sawyer*, 1 Aiken, 157; *Williams v. Weatherbee*, 2 id. 237; *Booker v. Bell*, 3 Bibb, 375. The rule was very clearly explained by Bronson, J., in the more recent case of *Kelly v. The Dutch Church of Schenectady*, 2 Hill, 113, where he held the following language: "But it is said that as the defendants had notice, and were requested to defend the ejectment suits, they are now estopped from setting up their title, and that question remains to be considered. Whether the defendants took part and aided the plaintiff in the defence of the suits brought against him, does not appear, but they must at least have furnished him with the means of setting up their title, for it was given in evidence on the trial. And this case is, I think, plainly distinguishable from those to which we have been referred in relation to the effect of notice, for the reason that the defendant's title was not only in evidence in the former suits, but it was virtually admitted to be a good title. The plaintiffs in those actions did not recover on the ground that their right was superior to that of the Dutch Church, but on the ground that the defendant in those suits was precluded by the acts and declarations of his immediate grantors from sheltering himself under the good title of the church. If the defendants, on receiving notice of a suit upon a title apparently superior to theirs, had neglected to appear and defend, and their title had not been given in evidence, or if, when in evidence, it had been adjudged defective, they would probably be estopped from setting it up in answer to an action on the covenants. But that is not this case.

There is a short, and I think, conclusive view of this question. The plaintiff had necessarily averred that he was evicted by persons having a title paramount to that of the defendants. Upon that averment issue has been

The next question to be considered in this connection is the effect of a judgment where there has been *no* notice, to the party bound by the covenant, of the suit upon which that judgment is founded. The question which here arises is also one as to the burden of proof, and seems not to have been very consistently decided. It has been held on the one hand that the judgment (though accompanied by such evidence as shows the recovery not to have been by title derived from the purchaser himself) is not of itself evidence of title,¹ but that the validity of the title upon which that judgment was recovered must be affirmatively made out by the plaintiff.²

joined. The plaintiff holds the affirmative, *and the burden of proof lies upon him*. He has not only failed to prove the averment true, but in attempting to do so, he has proved it false. It was not enough for the plaintiff to show that he gave the defendants notice of the suits brought against him, for the obvious reason that the claimants may have recovered on a right or title subordinate to that of the defendants. It was necessary, therefore, for the plaintiff to go further, and show on what ground the claimants succeeded. He did so; and the evidence has proved fatal to his cause." The decision in *Buckels v. Moulzon*, 1 Strobhart, 448, proceeded in effect upon the same grounds. *Swenk v. Stout*, 2 Yeates, 476, was decided on the ground of the demurrer having confessed all the facts that were well pleaded.

¹ It may be observed that the record might or might not be evidence of *eviction*, according as there did or did not appear upon its face, evidence of the execution of a writ of possession, as in *Fields v. Hunter*, 8 Missouri, 131; or according as the course of decision of the State might consider the record of the judgment itself as sufficient evidence, in most cases, of an *eviction*. Such seems to have been deemed sufficient in Kentucky in *Booker v. Bell*, 3 Bibb, 175; *Hanson v. Buckner's Exr.*, 4 Dana, 254, (*Davis v. Logan*, 5 B. Monroe, 342, was in Equity, and there was a general adjustment of title and damages;) but it has been frequently denied by cases which hold that a judgment itself, unaccompanied by evidence of an actual or constructive change of possession, is not proper evidence of an *eviction*: *McDonnell v. Hunter*, Dudley, 4; *Waldo v. Long*, 7 Johns. 376; *Paul v. Witman*, 3 W. & S. 410; *Webb v. Alexander*, 7 Wend. 286; *Ferris v. Harshea*, Mart. & Yerg. 55; *Hoy v. Taliaferro*, 8 Smedes & Marsh. 741; *Dennis v. Heath*, 11 Smedes & Marsh. 218; *Miller v. Avery*, 2 Barb. Ch. C. R. 582.

² Such was the course of decision in *Booker v. Bell*, 3 Bibb, 175; *Prewit v. Kenton*, id. 282; *Cox v. Strode*, 4 id. 4; *Hanson v. Buckner's Executor*,

On the other hand, it has been held with more reason that the plaintiff is not obliged to furnish evidence *dehors* the record, (except so far as to show that the adverse title was not derived from himself,) but that, on the presumption of *omnia rite acta*, the judgment is of itself *prima facie* evidence of the title being paramount; it being, however, perfectly competent for the defendant to inquire into the merits of that judgment. "Possibly," said Williams, Ch. J., in a recent case in Vermont,¹ speaking of the decision in *Williams v. Weatherbee*, "it would have been better in that case to have considered the record as *prima facie* evidence of all the material allegations, turning the burden of proof on the party who was bound to make the good title, and who was supposed to know what title he had when he gave the deed," and the law has been held the same way in Pennsylvania.²

But however prudent it may be for a purchaser, when sued under an adverse title, to give notice to the party bound by the covenant, and require him to defend the suit, it does not seem necessary to a support of the former's rights in the action on the covenant that such notice be given.³

⁴ Dana, 252; *Graham v. Tankerly*, 15 Alab. 645. (See also *King v. Norman*, 4 Com. Bench, 883; Note to *U. States v. Howell*, 2 American Leading Cases, 345;) and also at an early day in Vermont, *Williams v. Weatherbee*, 2 Aikens, 337; but see the more recent case of *Pitkin v. Leavitt*, 13 Verm. 384; *Stevens v. Jack*, 3 Yerger, 403; *Fields v. Hunter*, 8 Missouri, 128. In *Somerville v. Hamilton*, 4 Wheaton, 230, the question was left undecided.

¹ *Pitkin v. Leavitt*, 13 Verm. 384.

² *Collingwood v. Irwin*, 3 Watts, 310; *Raul v. Witman*, 3 Watts & Serg. 409.

³ *King v. Kerr*, 5 Ohio, 158; see *Duffield v. Scott*, 3 Term R. 376; *Smith v. Crompton*, 3 Barn. & Adolp. 408; 2 Sugd. 540. Sir E. Sugden says positively, "a purchaser is not bound to give notice of an adverse suit to the covenantor."

This was otherwise at the common law in case of warranty. Although it was only in real actions that the warrantee was permitted to vouch his warrantor, yet there were many of these in which voucher was not admissible,¹ yet if he were impleaded in any action in which voucher was admissible, it then became his duty to vouch his grantor to warranty; "and if he will not vouch him he shall not afterwards have a writ of *warrantia chartæ*."² Although under the more modern covenant of warranty, the substitute for voucher, notice, seems not necessary to be given, yet its advantage is, as has been seen, to enable the covenantee to recover on less testimony, since he is then not obliged to show under what title the recovery was had, except that it was not a title derived from himself.

¹ As in an assize, a *quod ei deforceat*, a *quare impedit*, etc., (2 Saunders, 32 a, note.)

² Fitzh. Nat. Brev. 134; Co. Litt. 101, b.; 8 Ed. IV. 11, per Markham, Ch. J.

So by the Spanish law a vendor, if not "cited to warranty," is not liable at all, and the vendee loses all recourse to him. By the Code of Louisiana, "The purchaser threatened with eviction, who wishes to preserve his right of warranty against the vendor, should notify the latter in time, of the interference which he has experienced. This notification is usually given by calling in the vendor to defend the action which has been instituted against the purchaser. In the absence of this notification, or if it has not been made in due time, that is, in time for the vendor to defend himself, the warranty is lost; provided, however, that the vendor shall show that he possessed proofs which would have occasioned the rejection of the demand, and which have not been employed, because he was not summoned in time." Art. 2493-4. By the civil law the vendor is not liable for his vendee's costs in defending the action, unless cited to warranty. In *Morris v. Rowan*, 2 Harrison, 307, the Court, "after looking at all the authorities, did not find that the question as to the costs had ever been made to depend upon the fact of notice. See *Duffield v. Scott*, 3 Term, 376.

There are several States in which provision seems to be made by statute, or perhaps local custom, for vouching in the covenantor. Where such is the case, I am not aware whether the old common law rule is, or is not enforced in the event of his not being thus vouched.

In reviewing then what has been said on the subject of notice, the following points appear to be settled by the weight of authority.

1. The notice must be full, distinct, and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit.

2. If such notice appear upon the record of that suit, or if the covenantor be made a party to it, the Court will be authorized to instruct the jury that the recovery in that suit is conclusive upon, and binds the defendant in the action on the covenant.

3. If the notice do not thus appear on the record, the question of conclusiveness of the judgment will depend upon the belief of the jury, as to its being received.

4. If there has been, either actually or constructively, no notice, the judgment will be *prima facie* evidence of the validity of the adverse title, which, however, the defendant will be at liberty to contradict; and,

5. It is not indispensable to the recovery on the covenant, that notice of the adverse suit shall have been in any way given.

Except where there is some peculiar local construction of the covenant of warranty, such as prevails in South Carolina, and formerly did in Ohio,¹ it is laid down as a technical rule in every case in which the question has been raised, that "the covenants of warranty and for quiet enjoyment are broken only

¹ See, *supra*, page 194-5.

by an eviction." But while the cases are thus unanimous as to the general principle, its application involves many questions arising out of the sense in which this word "eviction" is used.

The very nature of the cases which arise under these covenants, makes it extremely difficult to determine by general rule what in every case shall be an eviction, and, as is said by Koerner, J.,¹ "The great difficulty arising in this, as in many other cases, consists in this, that Courts have departed (and I think not improperly) from the stern technical rules of requiring actual ouster and eviction in cases both of breach of warranty and covenant for quiet enjoyment, and have held many acts or rather the concurrence of certain acts, as being equivalent to actual eviction by due process of law. It is not surprising that in deciding what shall be considered, not as acts of eviction, but as acts equivalent in law to actual eviction, and what shall not be so considered, some conflict of views has occurred; so much so, that it may almost be said that when no actual legal eviction has taken place, no general rule applicable to all cases can be laid down, and each particular case must be decided upon its own merits."²

The reason of this diversity seems owing to an unwillingness on the one hand to subject the covenantee to the trouble, delay, expense and sometimes idle form which a narrow interpretation of the term eviction would frequently impose, and on the other hand

¹ In *Beebe v. Swartout*, 3 Gilman, 179.

² For the rules of the Civil Law on the subject of eviction, reference may be had to Pothier, *Cont. du Vente*, n. 82—86, 100—103, 166—183; Troplong, *De la Vente*, Ch. VI. n. 415—463. By the Louisiana Code, "The eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claim of a third person. Art. 2476.

to a fear of the encouragement to negligence, looseness of practice and perhaps fraud, to which an enlarged interpretation is supposed to give rise.

The numerous cases upon the subject of eviction may perhaps be classed under two principal heads—first, those requiring actual dispossession; and secondly, those which allow a virtual or constructive dispossession to constitute an eviction.

Under the first of these heads may be classed, 1. Cases requiring the actual dispossession to be by process of law, consequent upon a judgment. 2. Cases where the actual dispossession is caused by the exercise of the common law right of entry; and, 3. Where the possession is voluntarily, though actually abandoned or surrendered to the adverse title; these constituting the three sub-divisions under the head of actual dispossession.

Under the head of constructive dispossession the cases may also be ranked in three classes. 1. Where the covenantee has never had any actual possession, having never been able to obtain it, by reason of the adverse title; 2. Where after the establishment of the adverse title by a judgment, the covenantee accepts a lease or other conveyance under it and remains in possession; and 3. Where he does so even although no judgment has established the adverse title.¹

The narrowest construction which has ever been given to the term “eviction,” is “a dispossession by

¹ A further distinction has recently been taken in New York. In *Kinney v. McCullough*, 1 Sandford's Ch. 378, land which had been purchased subject to a mortgage, was sold by proceedings under a paramount mortgage. The second mortgagee took the amount of his mortgage debt out of the fund, and the purchaser had the surplus. It was held that he was *equitably*, though not *legally* evicted under covenants which covered the second mortgage. “He was not evicted from the land, but from its proceeds.”

process of law." In an early case, in Massachusetts,¹ Parsons, Ch. J., said, "We are all of opinion that to form an eviction, according to its strict and technical meaning, a judgment of Court is necessary. But we are inclined to give to the term a more extended signification, and to understand it in this case as synonymous with ouster."

Indeed, there can hardly be said to be a class of cases based upon so narrow an interpretation of the word, as the case of *Lansing v. Van Alsteyne*,² proceeded upon a misapprehension of the preceding cases in New York, and its correctness was subsequently virtually denied.³ In these cases⁴ the term "lawful eviction," when used, was so employed as distinguished from tortious eviction, to which, as we have seen, the covenant for quiet enjoyment does not extend, nor by analogy does the covenant of warranty; and as those cases went very far in support of the doctrine of actual dispossession, when they used the term "by legal process," no more was meant than that "the covenantee ought not to stop short of an actual ouster . . . he has no right to make any compromise until an actual eviction has been shown."⁵ It was never intended by those cases to deny a remedy upon the covenant where the covenantee was ousted by virtue of a common law or a statutory right of entry under the better title.⁶ Still

¹ *Hamilton v. Cutts*, 4 Mass. 352. ² Cited in a note to 2 Wendell, 563.

³ *Greenvault v. Davis*, 4 Hill, 643.

⁴ *Greenby v. Wilcocks*, 2 Johns. 1; *Waldron v. McCarthy*, 3 Johns. 473; *Kortz v. Carpenter*, 5 id. 120; *Vanderkar v. Vanderkar*, 11 id. 122; and *Kerr v. Shaw*, 13 id. 238.

⁵ *Kerr v. Shaw*.

⁶ *Kerr v. Shaw* seems to have meant that after a judgment the covenantee could not *retire*, but must wait until actually turned out, which in such case could only be by an execution, but not to have gone to the extent that in no case could there be an eviction unless by an execution.

in *Lansing v. Van Alsteyne*, it was said that "taking those cases together they show that to constitute an eviction by a stranger there must be a disturbance of the possession under a paramount title by due process of law," and though in this case the dispossession was an actual one, and made under a paramount title and not a tortious one, a plea was held bad "for not showing process of law to warrant the expulsion;" and in *Webb v. Alexander*,¹ and *Stewart & Fine v. Drake*² a similar misapprehension of these cases is shown, the Court saying, in the latter case, that the authorities cited in the argument from Johnson's Reports, establish the principle that "there must be a disturbance in, or deprivation, or cessation of the possession by the prosecution and operation of legal measures."

On the other hand, so early as *Foster v. Pierson*³ a declaration on a covenant for quiet enjoyment was demurred to because it did not show an ouster "under any legal process of law," but the reporters say that "this was abandoned, the precedents being against it." The rule sought to be established by the case of *Lansing v. Van Alsteyne*, (which it has been already observed has been overruled in the State in which it was pronounced,)⁴ may be said to be not law at the present day.⁵

To give such an interpretation to the term eviction, would be to deny the benefit of the covenant to one whose dispossession has been caused by the exercise

¹ 7 Wendell, 285.

² 4 Halsted, 141.

³ 4 Term Rep. 617.

⁴ By *Greenvault v. Davis*, 4 Hill, 646.

⁵ *Coble v. Wellborne*, 2 Dev. 289; *Grist v. Hodges*, 3 id. 200; *Leary v. Durham*, 4 Geo. 593; *Booth v. Starr*, 5 Day, 282. In fact, all the cases cited under the ensuing heads, virtually overrule it.

of a right of entry on the part of the holder of the paramount title, which brings us to the second class of cases under the head of actual dispossession.

Entry is a common law remedy, which the holder of the paramount title had a right to exercise in three of the five species of ouster, viz., abatement, intrusion, and disseizin, but it was not allowed upon a discontinuance or deforcement, where the original entry being lawful, and thereby an apparent right of possession gained, that right was not allowed to be overthrown by the mere act or entry of the claimant.¹ And even in the three cases named, the right of entry (which was never assignable at law,)² might be tolled or taken away by a descent cast.³ Where the right exists,⁴ it would seem absurd to hold that its exercise was no eviction, merely because the holder of the better title had not first invoked the aid of a Court to do that which the law allowed him to do without putting any of its more complicated machinery in operation. The entry under these circumstances would clearly have all the force and effect of a writ of possession,⁵ and this seems so clear that were it not for the cases of *Lansing v. Van Alsteyne*, and *Stewart v. Drake*, no distinction would have been taken between them.⁶

¹ 3 Black. Com. 175.

² Co. Litt. 314 a.

³ Litt. § 385, 413.

⁴ In Massachusetts a mortgagee has given him by statute, a right of entry, in some cases, in presence of two witnesses. *Smith v. Sheppard*, 15 Pick. 147.

⁵ *Gore v. Brazier*, 3 Mass. 540; *Smith v. Sheppard*, 15 Pick. 147; *Rickert v. Snider*, 9 Wend. 422.

⁶ The cases under the head of actual dispossession appear to be based upon the authority of some old cases which seemed to require the doing of some positive act, as in *Fraunces' Case*, 8 Rep. 91; Com. Rep. 228. It seems always necessary that if the eviction be actual, it be complete, for in *Hunt v. Cope*, Cowp. 242, where a plaintiff in replevin pleaded that the landlord had broken and pulled down the roof and ceiling of a summer house on the pre-

The cases which decide in the third place that the dispossession may be voluntary on the part of the covenantee, who may surrender or abandon it to the holder of the paramount title, might at first seem to be more properly classed under the head of constructive eviction, since it may be said that the term eviction forbids the idea of voluntary dispossession. It is difficult, however, to determine precisely in every case how far a yielding up of possession to an irresistible title (or as it is sometimes termed an *ouster in pais*) is voluntary, or the result of prudence, and as the cases in this class seem to insist upon the actual yielding up of possession—the change of possession—they are distinguishable from those where there is no such actual change.

*Hamilton v. Cutts*¹ appears to be the leading case as to voluntary dispossession or *ouster in pais*. It was there said by Parsons, Ch. J.: "It was contended that here there was no legal evidence of an ouster, because the dispossession took place with the consent of the tenant in possession. It is true that if the tenant consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful, and in that case the tenant may yield to a dispossession without losing his remedy on the covenant of warranty. . . There

mises, "by means whereof the plaintiff had been deprived of the use thereof," etc. Lord Mansfield said, "the plea states merely a trespass and no eviction." So in *Reynolds v. Buckle*, Hob. 326 a, "a plea that the plaintiff did enter upon him, but did not say that he did expel him or hold him out," was said to be insufficient.

The law as to what acts of annoyance will amount to an eviction, was very ably laid down by Sutherland, J., in the case of *Pendleton v. Dyott*, 4 Cowen, 581, which was, however, overruled by the Court of Errors in *Dyott v. Pendleton*, 8 id. 727.

¹ 4 Mass. 350.

is no necessity for him to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail." So in *Clark v Anulty*,¹ it is said by Gibson, J. "The law does not require the idle and expensive ceremony of being turned out by legal process where that result would be inevitable." And in *Greenvault v. Davis*,² it is remarked by Bronson, J.: "There is no reason why such surrender without the trouble and expense of a lawsuit should deprive him of a remedy upon the covenant. The grantor is not injured by such an amicable ouster—on the contrary, it is a benefit to him, for it thus saves the expense of an action against the grantor to recover the possession."³

¹ 3 Serg. & Rawle, 372.

² 4 Hill, 646.

³ Again in *Radcliff v. Ship*, Hardin's Rep. 292, it is said, "Had the plaintiff refused to yield that just respect and due obedience to the Court, which every good and well disposed citizen ought to render, then it would have been necessary, in order to effectuate the justice of the case, and to complete the right of the plaintiff in ejectment, to have executed the writ of possession; but surely there can be no objection to his acquiescing in and submitting to the judgment, thereby rendering compulsion unnecessary, and preventing the further accumulation of costs." And the law as thus stated was recognized in *Woodward v. Allen*, 3 Dana, 164; *Hanson v. Buckner's Exr.* 4 Dana, 204; *Sprague v. Baker*, 17 Mass. 590; *Slater v. Rawson*, 1 Metcalf, 455; *Loomis v. Bedel*, 11 New Hamp. 83; *Sterling v. Peet*, 14 Conn. 245; *Patton v. McFarlane*, 3 Penna. Rep. 425; *Poyntell v. Spencer*, 6 Barr, 254; *Stone v. Hooker*, 9 Cowen, 159; *Miller v. Avery*, 2 Barb. Ch. Rep.; *Haffey's Heirs v. Birchetts*, 11 Leigh, 88; *McDowell v. Hunter*, 4 Dudley, 4; *Ferris v. Harshea*, Mart. & Yerg. 56; *Beebe v. Swartout*, 3 Gilman, 184.

"It appears to me," said Koerner, J., in *Beebe v. Swartout*, which was elaborately argued, "that the covenantee must exert himself in some way to enjoy his possession, or must affirmatively prove that his adversaries have paramount and superior title to his, before he can sue on the covenant, or obtain redress in a Court of Chancery. He must not only show that he is weak, for weak as he may be, he may yet be strong enough for his adversaries, but he must show that his adversaries are stronger than he is. To paramount title, provided he can establish it, he may peaceably and voluntarily yield, but he cannot be permitted to abandon the premises, or buy in an outstanding claim where a mere claim is set up by another, which may be destitute of

"The old rule of requiring the subsequent purchaser to hold on till ousted by a judgment of Court," said Lumpkin, J.,¹ "is now exploded. It went upon the presumption that a legal investigation was necessary to determine in whom the legal estate was. But this doctrine is now repudiated, as being at war with the principles of justice. The honest purchaser might in this way see his vendor wasting all his effects, or going beyond his reach without the power of securing

all foundation, or may rest in a fabric of his own construction." Under the two latter circumstances, however, a recovery could never be had even had there been an actual dispossession.

The earlier cases in New York (being those cited on p. 213,) seem not to have gone to the extent of those just quoted, as it is said in *Kerr v. Shaw*, "The covenantee ought not to stop short of an actual ouster if he means to rely upon his covenant—he has no right to make any compromise until an actual eviction has been shown," thus denying the doctrine of "*ouster in pais*"—but the later cases in that State, as well as throughout the Union generally, have departed from this severity of rule. Although in Mississippi there are expressions in the cases of *Hoy et al v. Taliaferro*, 8 Smedes & Marshall, 741, and *Dennis v. Heath*, 11 id. 218, which seem to approve the early New York authorities, yet the question did not arise directly in an action on the covenant of warranty, but the breach of the covenant was attempted to be set up as a defence to the payment of the purchase money, and the Court seemed unwilling to try the question of title in that action. In *Hoy v. Taliferro*, it is said, "We have not been furnished with any authority to show that a sale either by a marshal or a sheriff, is equivalent to an eviction. Manifestly it is not so, since the original vendor may still protect his vendee by purchasing from the marshal's vendee. Or it may happen that the title acquired from the marshal would not be sufficient to effect an eviction. The *voluntary abandonment in this instance gives no strength whatever to the defence*. A Court of law, although the proper tribunal for the trial of titles to land, will not try such titles collaterally." But in the more recent case of *Witty v. Hightower*, 12 S. & M. 481-2, Clayton, J., remarked, "The utmost limit to which the cases, cited by the counsel of the plaintiff, go, is that an actual eviction under judgment of court is not always necessary. An ouster, may be sufficient, but then the burthen of proof is upon the party who has yielded the possession. *Hamilton v. Cutts*, 4 Mass. 350; *Stone v. Hooker*, 9 Cow. 157. But these cases do not establish, that there can be a breach of the covenant of warranty without an eviction, an ouster, or a surrender, or holding out under a paramount, outstanding title."

¹ *Leary v. Durham*, 4 Geo. 606.

himself against that loss which, sooner or later, he must inevitably suffer."

But in practice the rule, as stated now generally to exist, must be adopted with care. The covenantee must, of course, first examine whether the adverse title be tortious or not; for if it be he will not in any event have a remedy against his covenantor.¹ Being then satisfied that the claim is what is termed "by title," he must assume the responsibility of determining upon the chances of its success, and if he choose to retire before it, it is at his own peril, and in the suit against his covenantor he must assume the burden of proof, and rely upon and make out the adverse title to which he has yielded.² The authorities then decide that even where the holder of the adverse title has not at that time the power summarily to obtain possession under his title, either by entry, or by process under a writ of execution, or having the power does not choose to exercise it, the covenantee may anticipate the attainment of such power, and voluntarily surrender the possession, by which *ouster in pais* if it be actual, a sufficient eviction will be caused to support an action on the covenant, in which, however, he will be obliged to prove that the results he anticipated were inevitable.³

¹ See *supra*, p. 147.

² *Hamilton v. Cutts*, 4 Mass. 350; *Stone v. Hooker*, 9 Cowen, 157; *Green-vault v. Davis*, 4 Hill, 643; *Smith v. Sheppard*, 15 Pick. 147.

³ It was, however, suggested in *Sprague v. Baker*, 17 Mass. 590, and stated in *Dupuy v. Roebuck*, 7 Ala. 488, to have been held, that the mere exercise of an opinion that the adverse title is a paramount one, will not of itself justify an *ouster in pais*, but that there must be a threat of dispossession, or at least a demand made. This, however, was not the point on which *Sprague v. Baker* was decided, the question being one which will be considered under the next head, and the cases cited in *Dupuy v. Roebuck*, do not seem to have taken this distinction.

Under the head of constructive eviction the first point to be considered is, whether in case the covenantee never has been able to obtain the possession at all, such failure to get possession will be an eviction within the covenant. It was said by Chief Justice Marshall¹ that "the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and a majority of the Court are disposed to think may be disregarded by a general demurrer." So in Massachusetts,² Parker, Ch. J., remarked, "No entry having been made by the plaintiff under his deed, an eviction could not have taken place." So in a subsequent case³ it was said "such a state of things comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee, so that he can be evicted." And in New York,⁴ where the breach of the covenant was alleged to be, that at the date of the deed to the plaintiff, and long before, the premises were actually possessed and enjoyed under lawful title by the proprietors of the Hardenby patent; this, on general demurrer, was held not an eviction. So in *St. John v. Palmer*,⁵ it was held, by Bronson, J., (apparently overruling what was said by Nelson, Ch. J., in *Gardener v. Keteltas*,⁶) that if the covenantee never had the possession, however hard the case might be, no action would lie on the covenant for quiet enjoyment. The grantee should have protected himself by other covenants.⁷

The decision in *St. John v. Palmer*, was sought to

¹ *Day v. Chism*, 10 Wheat. 452.

² *Chapel v. Bull*, 17 Mass. 220.

³ *Jenkins v. Hopkins*, 8 Pick. 349.

⁴ *Kortz v. Carpenter*, 5 Johns. 120.

⁵ 5 Hill, 601.

⁶ 3 Hill, 332.

⁷ But this case was itself in effect overruled by the decision in *Withers v. Codwise*, reported and approved in *Banks v. Walker*, 2 Sand. Ch. Rep. 350.

be supported by the authority of an old case,¹ where the plaintiff brought covenant upon the warranty implied by the word *demisi* in a lease, and proved a prior lease to a stranger, who was in possession. Upon objection that the plaintiff showed no actual entry on his part, and expulsion of the stranger, it was held that the word *demisi* implied a power of leasing, which if it did not exist was of course broken as soon as made, and also that it was not reasonable to force the lessee to enter upon the land and so commit a trespass; "but if it were an express covenant for quiet enjoying, then perhaps it were otherwise."

This supposition is, however, met by the case of *Cloake v. Harper*,² where the lands having been previously conveyed by the king, to whom they rightfully belonged, a demurrer by the defendant that the plaintiff did not allege an entry, and so could not be disturbed, was held bad, the Court saying, "The declaration is good enough, for having set forth a title in the patentee of the king, the plaintiff shall not be enforced to enter and subject himself to an action by a tortious act."

In a more recent case,³ though the decision was made on another point, the Court say that "the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which could not have taken place here, on account of the prior leave granted." It has been said by Lord Mansfield,⁴ "Some ambiguity seems to have arisen from the term 'actual

¹ *Holder v. Taylor*, Hobart, 12.

² *Freem.* 122.

³ *Ludwell v. Newman*, 6 Term Rep. 458, quoted with approbation in *Gardiner v. Keteltas*, *supra*.

⁴ *Fisher v. Prosser*, Cowp. 218.

ouster,' as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without a title. If he does so, such holding over, under circumstances, will be equivalent to an actual ouster." And this view has since been recognized in England.¹

There are very strong reasons why, at least in conveyances deriving effect under the statute of uses, this principle should be adhered to, and these have been stated with admirable force by Ruffin, J.,² who said, "The existence of a better title, with an actual possession under it in another, is of itself a breach of the covenant. It is manifestly just that it should be so considered; for otherwise the covenantee would have no redress, but by making himself a trespasser by an actual entry, which the law requires of nobody; or by bringing an unnecessary suit; for the event of that suit proves nothing in the action on the covenant. But upon purely legal grounds it is so. For as between the bargainor and bargainee, the latter is in by force of the statute of uses. It is upon that idea that the legal estate is acquired by a deed of bargain and sale. It passes the use, and the statute carries the possession. It is so in the conveyance by lease and release. There must be a possession for the latter to operate on. But it is not in actual possession—at least, the actual entry need not be proved. The statute transfers the possession, and the lessor cannot say it was not actual for the purpose of de-

¹ *Hawks v. Orton*, 5 Adolp. & Ellis, 367, per Littledale, J., though, under the circumstances of the case, judgment was entered for the defendant.

² *Grist v. Hodges*, 3 Devereux, 200.

feating his subsequent release. As between the parties, then, the bargainee is on strict principles; but, if there be in reality an adverse possession, he can only be held to be in for an instant; for there will be no implication against the truth, further than is necessary to make the deed effectual for its purposes. If such adverse possession be upon title paramount, then there is an eviction of the bargainee *eo instanti* that the possession conferred by the statute takes place."

In fact, what was said in the cases of *Day v. Chism* and *Chapel v. Bull*, can hardly be said to form part of the actual decisions, and the authority of *St. John v. Palmer*, and the other early New York cases, must yield to the later decision of *Withers v. Powers & Codwise*,¹ and the general principle so ably explained by *Ruffin, J.*, has been recognized and applied in many other cases.²

Some analogy to this principle may be found in the old common law, which, although strictly requiring livery of seizin to accompany every feoffment, allowed the feoffee, where he dare not enter through fear of his life, or bodily harm, to make a yearly con-

¹ Reported in, and approved by the case of *Banks v. Walker*, 2 Sand. Ch. 350.

² *Duval v. Craig*, 2 Wheat.; *Curtis v. Deering*, 3 Fairf. 501; *Phelps v. Sawyer*, 1 Aiken, 158; *Park v. Bates*, 12 Verm. 387; *Loomis v. Bedel*, 11 New Hamp.; *Miller v. Halsey*, 2 Green, 50; *Randolph v. Meeks*, Mart. & Yerg. 60; *Caldwell v. Kirkpatrick*, 6 Alab. 60; *Banks v. Whitehead*, 7 id. 83; *Dennis v. Heath*, 11 Smedes & Marsh, 206; *Witty v. Hightower*, 12 id. 473; *Woodford's Heirs v. Pendleton*, 1 Hen. & Munf. 308; *Cummins v. Kennedy*, 3 Littell, 123.

A precedent for a declaration where the breach is caused by a failure to get possession, will be found in 5 Wentw. Plead. 53. In *Rushleigh v. Williams*, 2 Ventris, 60, judgment was given for the plaintiff on a breach assigned that he was sued in an action of trespass for putting in his cattle, and obliged to pay damages and costs, *per quod*, etc. The declaration in the case is given in full in Latin.

tinual claim, as near the land as possible, which would be "a good entry in law."¹

The rule, therefore, as best supported by reason and authority, would seem to be this—where, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken, without any other act on the part of either the grantee or the claimant; for the latter can do no more towards the assertion of his title, and as to the former the law will compel no one to commit a trespass in order to establish a lawful right in another action.

But it would seem that in some of the most important cases which arise in this country upon covenants of warranty, this rule cannot apply. Vast bodies of land are here wholly without actual occupation; and, therefore, principles which are adapted to cases where, in an improved and settled country, there is almost always a possession, either by the owner himself, or, what is the same thing, his tenant, cannot so well be applied to those where there is no actual possession.

With respect to wild and uncultivated lands it has long been settled that the owner is to be deemed in possession, so as to enable him to bring trespass against a wrong doer, on the ground that the legal seizin draws with it the possession, unless there is at the time an adverse possession.² When these lands

¹ Co. Litt. 253 a.

² *Proprietors of Kennebec v. Call*, 1 Mass. 484; *Van Brunt v. Shenck*, 11 Johns. 385; *Mather v. Trinity Church*, 3 S. & R. 514; *Bush v. Bradley*, 4 Day, 306.

When the cases say that this rule applies only when there is no adverse

are, through the medium of the statute of uses, conveyed with covenant of warranty, there is, in the absence of a better title, a constructive possession given to the grantee. But if a better title exists, it seems that the constructive possession is already cast upon the holder of such title, it then becomes a question whether the covenantee shall be entitled to support his action merely upon these facts? If so, this would establish the rule (which has always been denied) that the mere existence of a better title will be an eviction within the covenant.¹ It will be observed that the reasoning in the case of *Grist v. Hodges*,² seems to point to an actual adverse possession, by virtue of the paramount title.

possession, this is principally intended to preserve the effects of the statutes of limitation, as those statutes would be totally useless in case an actual, visible and notorious possession for the prescribed length of time could be defeated by the constructive possession given to the true owner. As between parties claiming by title, the possession would of course follow the better title. The principle of adverse possession was thus clearly stated by Story, J., in *Clarke's Lessee v. Courtney*, 5 Peters, 354. "If a mere trespasser, without any claim or pretence of title enters into land, and holds the same adversely by the title of the true owner, it is an ouster or disseizin of the latter. But in such case the possession of the trespasser is bounded by his occupancy; and consequently the true owner is not disseized except as to the portion so occupied. But where a person enters into land under a deed or title, his possession is so construed to be co-extensive with his deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For if the true owner be at the same time in possession of a part of the land, claiming title to the whole, then his seizin extends by construction of law to all the land which is not in the actual possession or occupancy, by enclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain; both parties cannot be seized at the same time of the same land under different titles, and the law therefore adjudges the seizin of all which is not in the actual occupancy of the adverse party, to him who has the better title." See Mr. Wallace's note to *Taylor v. Horde*, 2 Smith's Leading Cases, 469, Amer. ed.

¹ See *supra*, page 194.

² *Supra*, page 222.

Before dismissing this class of cases it must be observed that where they speak of the breach of these covenants being caused by the inability of the grantee to obtain the possession, they mean that such possession must be under a title actually paramount, and not such a possession under claim or color of title as would, by the lapse of time, ripen under the limitation acts, into a perfect title. Such a possession might, according to some authorities, cause a breach of the covenant for seizin,¹ but there appears to be none which decide that it would cause a breach of the covenant of warranty, or for quiet enjoyment. On the contrary it was held in an early case in Vermont² that such a possession would be no breach of the covenant.

But by referring to what has already been said on the question of notice, it will be seen that the burden of proof is capable of being much modified, or entirely removed, according to the circumstances of the case. Where the adverse right of possession has been established by a judgment in any action of which the covenantor has been properly notified, the burden will be altogether removed, and the judgment will be conclusive evidence of the paramount title.³ Where the notice is doubtful, the conclusiveness of the judgment on the question of title will depend upon whether it was properly given.⁴ When, therefore, there has been a judgment upon the question of title, the burden of proof, according to some authorities,

¹ *Supra*, page 57.

² *Phelps v. Sawyer*, 1 Aiken, 157.

³ *Miner v. Clark*, 15 Wend. 427; *Middleton v. Thompson*, 1 Spears, 67; *Wilson v. McElwee*, 1 Strobb. 65. See *supra*, page 199.

⁴ *Collingwood v. Irwin*, 3 Watts, 310, *supra*, page 203.

is removed from the covenantee by his giving the record in evidence. But when there is no judgment, the burden of proof rests upon him, and he will be compelled to make out the adverse title with as much particularity as if he were suing upon it in ejectment.¹ The question of the title having been settled by a judgment has, then, under this view of the law, nothing to do with the eviction, except as a matter of evidence.

In approaching the last two classes of cases upon this doctrine of eviction, more difficulty is experienced than in any of the others. The first of them involves the question whether, after the establishment of the adverse title by a judgment, an eviction will be caused by the covenantee having purchased or taken a lease under such title without any actual change of possession.

In support of the affirmative of this question it may be said that it cannot be doubted that, by an eviction under a paramount title, the relations between the covenantor and the covenantee, growing out of the title which passed from the one to the other, are dissolved. This being so, there is nothing in the law which can after such an eviction (whether caused by legal process, by entry or by a voluntary retirement is immaterial, as the reason applies equally to all,) prevent the formation of a new relation between the dispossessed covenantee and the holder of the better title. In an action on the covenant of warranty, a plea that a year after the eviction of the covenantee,

¹ *Greenvault v. Davis*, 4 Hill, 643.

he had taken a conveyance under the better title, by virtue of which he had regained the possession, would certainly be held bad on general demurrer. This would have been a subsequent and new contract growing out of a different set of relations, and which could not affect the rights which had been acquired under the conveyance of the previous year. This being premised, there would seem no reason why any interval of time should elapse between the cessation of the old relations and the formation of the new ones, and if the covenantee can be ousted of possession under one title in the forenoon, and can regain possession under the other in the afternoon of the same day, or at any less interval of time, it would seem strange to hold so idle a ceremony of mere form absolutely necessary for the purpose of giving a party substantial rights under his covenant.¹ As for the allegation that a door might be opened to fraud, it may be answered, that if fraud is intended, it can easily be cloaked with legal form. The question of fraud or collusion will always be open for the benefit of the covenantor, and he may have greater difficulty in establishing it, in proportion as the transaction is enshrouded with technical formalities.

On the other hand, it has been urged that, in the first place, such a doctrine tends to sweep away all distinction between a covenant for seizin and a covenant of warranty. By degrees, an eviction, which has always been held essential to a breach of the latter, is frittered away to a mere name. In the next place it holds out at least an encouragement to fraud, and the temptation to it will increase in proportion as the

¹ See *Poyntell v. Spencer*, 6 Barr, 257.

requirements of the law are relaxed. It has also been argued that the case is analogous to that between landlord and tenant, with reference to the rule that a tenant is prohibited from disputing his landlord's title, unless there has been an actual eviction under a paramount title.

If there be such an analogy as is lastly suggested, it might perhaps be difficult to deny the superior weight of the argument on the latter side of the question. The point, therefore, assumes an importance which may justify a digression which would not otherwise be made.

Some difference of opinion appears to exist with respect to the source of this rule, and it seems to have been often, if not generally, supposed to have been feudal in its origin, forming part of the doctrine of disclaimer. It appears, however, that none of the older cases mention the rule. In the 58th section of Littleton, in commencing the subject of "tenant for term of years," he says: "And where the lessee entereth by force of the lease then he is tenant for term of years, and if the lessor reserve to him a yearly rent upon such a lease, he may choose for to distrain upon the lessee. But in such case it behooveth that the lessor be seized of the same tenements at the time of his lease, for it is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead." And Coke, in referring to this section says, "The reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus pro actum*, and therefore if the lessor hath

nothing in the land, the lessee hath not *quid pro quo*, nor anything for which he should pay any rent." Hence it appears that unless where the lease were by indenture, (in which case the doctrine of "estoppel by deed" applied,)¹ the rule in question formed no part of the common law. We find then no trace of it until we come to the later reporters. "It has been ruled often," said Dampier, J.,² in the year 1815, "that neither the tenant nor any one claiming by him can dispute the landlord's title. This I believe to have been the rule for the last twenty-five years, and I remember was so laid down by Buller, J., upon the Western circuit." We find it referred to by Kenyon, Ch. J.,³ but in connection with a different principle,⁴ and Tilghman, Ch. J., has remarked,⁵ "The principle was certainly a departure from the strict rule of law."

This rule, then, having no foundation in the old common law, it has been well suggested⁶ that "its origin must be sought in the general principle, that where a party has kept or obtained the possession of land which he otherwise would not have had, by means of an agreement or understanding, he shall be estopped from setting forth anything in opposition to its terms or intent, in a suit brought in order to recover such possession. The principle was of necessity called into being by that feature

¹ *Jordan v. Twells*, Rep. temp. Hardwicke, 161.

² *Doe v. Smythe*, 4 Maule & Selw. 347.

³ In *Cooke v. Loxley*, 5 Term Rep. 5.

⁴ It being held there, as elsewhere, that in an action of assumpsit for use and occupation, the issue sought to be raised by the question of title was immaterial. *Cobb v. Arnold*, 7 Metcalf, 398.

⁵ In *Hamilton's Lessee v. Marsden*, 6 Binney, 47.

⁶ In the note to *Doe v. Oliver*, 2 Smith's Leading Cases, 541. Amer. ed.

of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession decisive in favor of the defendant." It never could be pretended that, in general, the acceptance by a grantee of a conveyance of an estate from the grantor, precluded the former from denying the title of the latter, since, if such were the rule, all the covenants for title would be at once useless, as the essence of a breach of these covenants is the existence of a title or a possession paramount to that of the grantor.¹

It will further clearly appear from examining the statute of 11 Geo. II., c. 19, that it was deemed no more than just that in cases of conflicting titles a tenant should be protected against his landlord by payments to the holder of the paramount title where such title appears by matter of record, and even in the one case where it did not so appear. The 11th section of that statute, after reciting that the possession of estates is rendered very precarious by reason of the fraudulent practices of tenants in attorning to strangers who claim title to the estate of their landlords, who by that means are kept out of possession and put to the difficulty and expense of recovering the possession by suit, declared that all such attornments should be void to all intents and purposes, with, however, this proviso: "Nothing herein contained shall extend to vacate or affect any attornment made pursuant to

¹ And even in cases arising under the relation of landlord and tenant, many limits have been set to the estoppel of the latter. *Cobb v. Arnold*, 7 Met. 398. One of the most familiar of these is, that he is permitted to show that his lessor's title is expired. *Walton v. Waterhouse*, 1 Wms. Saund. 418, note. *Holcraft v. Keep*, 2 Moore & Scott, 767; *Doe v. Seaton*, 2 Crompt. Seat. & Rosc. 728; *Jackson v. Rowland*, 6 Wend. 666; *Randolph v. Carlton*, 8 Ala. 606; 14 Peters, 156.

and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." The fairness of this proviso is sufficiently manifest, and the rule it contains has been observed both where such a statute is,¹ and where it is not of binding authority, and it has been repeatedly held that a payment of rent by the tenant to a mortgagee claiming under a mortgage prior to the lease, and who has at that time a right of entry, is a sufficient defence in an action brought to recover this rent by the landlord.²

It must be observed, with respect to these cases, that in reality they seem to proceed upon the ground of constructive eviction.³ There is an entire cessation

¹ *Lumsford v. Turner*, 5 J. J. Marsh, 104.

² *Jones v. Clark*, 20 Johns. 51; *Magill v. Hinsdale*, 6 Connect. 469; *Smith v. Shepard*, 15 Pick. 147; *Stone v. Patterson*, 19 Pick. 476; *Weld v. Adams*, 1 Metcalf, 494; *Chambers v. Pleak*, 6 Dana, 428; *Pope v. Garbett*, 9 Barn. & Cress. 245; See *Mayor of Poole v. White*, 15 Mees. & Welsby, 577; *Waddilove v. Barnett*, 2 Bing. N. C. 538; *Franklin v. Carter*, 1 Com. Bench, 760. In *Doe v. Barton*, 11 Ald. & Ell. 314, Denman, C. J. said, "The tenant may be said to satisfy the rule when he admits that at the time when he was let into possession, the person who so let him was mortgagor in possession, not treated as a trespasser, and so had title to confer on him, the tenant, the legal possession, and yet may go on to show that subsequently he has been treated as a trespasser, whereby his (the mortgagor's) title, and the tenant's rightful possession under him have been determined. . . . It is conceded on all hands that when a lease is made by a mortgagor subsequently to the mortgage, and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, as here, the relation of landlord and tenant may arise between the parties. Or, at all events, the mortgagee may be entitled to sue the tenant for use and occupation. Therefore under the circumstances of the case, it is plain that the mortgagee was entitled to the profits of the land, and the defendants were right in paying him those profits, whether strictly called rent or not. He might have ejected them, and afterwards let to them; and it seems absurd to require him to go through the form of an ejectment in order to put them into the very position in which they now stand."

³ Indeed, in 5 *Wentworth's Pleadings*, 63, will be found a declaration on a

of tenure between the old landlord and the tenant,¹ and there is a creation of an entirely new tenure between the latter and the mortgagee. The mortgagee does not step into the shoes of the landlord, and under no circumstances can there be a *continuation* of his rights. When, therefore, Bayley, J., said, in *Pope v. Garbett*,² "the mortgagee, by giving notice to the tenant, of the mortgage, may thereby make him his tenant, and entitle himself to receive the rents;" this, which was not necessary to the decision of the case, was properly denied in subsequent cases.³ It is evident that the mortgagee had no legal power to compel the tenant to remain in possession. Clearly, if the tenant, upon receiving the notice, had retired from the premises, no action could be maintained against him, by the mortgagee, for the rent accruing subsequently to the notice, while if the relation between the landlord and tenant passed, as such, to the mortgagee, the tenant would, notwithstanding he quit the possession, be liable for the rent until the expiration of his term. All the effect then of a notice, and a continuing in possession is, as has been said,⁴ to raise a

covenant for quiet enjoyment, in which the breach assigned is for letting ground rent go in arrear, "by means of which he, the said plaintiff, was called upon and forced and obliged to pay, and did then and there pay the same, in order to prevent his goods and chattels then being on the said premises, from being distrained upon for the same, to wit: one A. B. to whom the same then and there of right was due and payable, whereof the said defendant afterwards then and there had notice and was then and there required to save, defend, keep harmless and indemnify the said plaintiff for the same. Yet the said plaintiff in fact says that the said defendant not regarding, etc., did not, when he was so requested as aforesaid, save, defend," etc.

¹ *Fitzgerald v. Beebe*, 2 English, 320; *Gore v. Stevens*, 1 Dana, 203.

² 9 Barn. & Cress. 245.

³ *Evans v. Elliott*, 9 Ad. & Ell. 342; and *Broom v. Storey*, 1 Scott, N. C.

⁴ In *Broom v. Storey*.

presumption that the tenant consented to hold under his new landlord upon the old tenure, and this is viewed in law as if there had been an actual eviction by the mortgagee, and a re-possession given by him to the tenant. This is stated in plain terms by Pollock, C. B.:¹ "If a party, having a good right to eject the occupier of demised premises, goes there, and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that, according to good sense, is capable of being well pleaded as an expulsion."²

If a contrary doctrine to this prevailed, the situation of tenants, who originally derived their possession under a lease subsequent in date to a mortgage, would be hard in the extreme, since on the one hand the mortgagee may threaten him with an ejectment, and hold him liable for mesne profits, unless he consent to pay the rent to him, while, on the other hand, such payment would be no defence as against his original landlord, when sued by him for the rent. It is true that the mortgagee cannot distrain for the rent, nor bring an action to recover it,³ there being no privity between the tenant and himself, but he may obtain the same results indirectly by a threat of ejectment, and an action for mesne profits.

¹ In *The Mayor of Poole v. White*, 15 Meeson & Welsby, 577.

² See, accord. *Clapp v. Coble*, 1 Dev. & Bat. Ch. Rep. 177.

³ *McKinshier v. Hawley*, 16 Johns. 286; *Mayo v. Shuttuck*, 15 Pick. 533.

It seems to have been on this ground that in *Souders v. Vansickel*, 3 Hals. 313, the tenant was denied the defence of having made payments to the mortgagee. Evidence in support of this, though inadmissible under a plea of *nil habuit*, seems proper as being equivalent to a constructive eviction. In New York, the revised statutes having taken away the mortgagee's right to obtain possession, such evidence would of course be in every way inadmissible. *Jackson v. Myers*, 11 Wendell, 537.

From these remarks it will be perceived that the rule has by no means the universal application which has been attributed to it. It has been said,¹ "As it is a rational rule, it will not be extended beyond the principle on which it is founded. Allegiance and protection are correlative and co-extensive. Whenever it is ascertained, by a competent judgment or decree, that the landlord's title is insufficient for the security of the tenant, the relation between them may be renounced, and the tenant may protect himself under the paramount title."

In the application of these remarks to the subject of eviction, as connected with the covenants of warranty, and for quiet enjoyment, it seems clear that there may be reasons in favor of a somewhat rigid adherence to the rule that a tenant shall not dispute his landlord's title, which lose their force when applied to a conveyance purporting to pass the whole estate of the grantor, and leaving no reversion in him. For the relation of landlord and tenant imposes upon both parties far more rights and obligations than that of vendor and purchaser.² There seems no obligation of allegiance and loyalty on the part of the latter towards the title he has received. The mischief to which the absence of such a rule as between landlord and tenant must lead, would evidently be, that a tenant, having obtained the possession from his landlord, could betray it to another, and thus drive the former to an ejectment to regain the possession. The result would be, that no land-

¹ *Lumsford v. Turner*, 5 J. J. Marshall, 104.

² *Blight v. Rochester*, 7 Wheat. 548; *Watkins v. Holman*, 16 Peters, 54; *Page v. Hill*, 11 Missouri, 149; *Osterhart v. Shoemaker*, 3 Hill, 518; *Kenada Gardner*, 3 Barb. S. C. Rep. 589.

lord would ever be safe from the prospect of litigation. Hence the tenant's obligation to restore to him the possession. But as between vendor and purchaser, there can be no such danger. With the execution of the conveyance, as a general rule, all rights and obligations between the parties cease, except those which arise from the purchaser's obligations as respects the unpaid purchase money, and his rights upon the covenants which he has received. By the contract, as intended to be fulfilled, the possession has left the vendor, never to return to him.¹ There appears, therefore, far less room for the application of the rule that prevails as between landlord and tenant.

Hence it may be safely said, that in those courts in which it is held that a constructive eviction is caused by a tenant being obliged, on pain of dispossession, to accept a lease under a paramount title, either based upon a mortgage or a judgment of a court of competent jurisdiction, it would, *a fortiori*, be held that a constructive eviction, so as to amount to a breach of the covenant of warranty or for quiet enjoyment, would be caused by the purchase of such a title by the covenantee, or whoever may be entitled to the benefit of the covenant, and such appears to be the current of authority in those courts. Thus in

¹ Thus it is probable that the rule now under discussion would never be applied to the case of a tenant who had received a conveyance in fee, containing a reservation of a ground rent to the grantor. *Naglee v. Ingersoll*, 7 Barr, 185, will on examination be found not to contradict this supposition. "The fourth plea," said Bell, J., "is either a *nil habuit in tenementis*, which in covenant is bad on demurrer, or it is tantamount to a plea of eviction. But neither of the latter pleas set out the name of the evictor or allege that he entered upon the defendant's possession, by virtue of a *lawful title acquired before or after the time of the grant to the defendant*. This averment is absolutely essential to the sufficiency of such plea," etc.

Massachusetts,¹ where one who had received land with a covenant for quiet enjoyment and of warranty, paid the amount of a mortgage upon being threatened by the mortgagee to sue for possession of the premises under it, it was held that there was nothing to distinguish this case from that of *Hamilton v. Cutts*, above cited, "but a point of form, which does not affect the merits of the question. The plaintiff has been disturbed in the enjoyment of his possession, and he has been compelled to purchase in another title for his own security, which we think very clearly has been a lawful interruption, and a breach of the covenant of quiet enjoyment." The principle here plainly laid down was indeed no great advance upon the prior Massachusetts authorities, it having been held² that where a mortgagee had, according to the local statutes, entered upon the lands mortgaged; which were then in the possession of the covenantee, who remained in possession until the expiration of the period of redemption allowed to the mortgagor, and then paid off the mortgage, the covenantee was entitled to support an action on his covenant of warranty. The existence of a mortgage seems placed upon the same footing as a paramount title established by a judgment of a court of record, as appears both by the statute of Geo. II.³ and in the cases generally, on the ground that a mortgagee (except in New York, since the revised statutes,) has always a right of possession,⁴ and where a paramount title has been established by a court of competent jurisdiction, it has been repeatedly held

¹ *Sprague v. Baker*, 17 Mass. 590.

² In *Wyman v. Bridgen*, 4 Mass. 150, a case which should be read in connection with *Langdon v. Potter*, 3 id. 218, and *Gore v. Brazier*, id. 535.

³ *Supra*, page 231.

⁴ Notes to *Keech v. Hall*, 1 Smith's Leading Cases, 495.

that there is no objection to a purchase or lease of such title being made by the covenantee, and that the idle form of actually and formally leaving the possession, in order formally to return to it under the new title, is unnecessary.¹

¹ *White v. Whitney*, 3 Met. 83; *Donahoe v. Emery*, 9 Met. 68; *Bevis v. Smith*, 10 id. 194; *Williams v. Wetherbee*, 10 Aik. 233; *Strong v. Shumway*, D. Chipman, 110; *Donnell v. Thompson*, 1 Fairf. 170; *Kelly v. Low*, 18 Maine, 244; *Haffey's Heirs v. Birchetts*, 11 Leigh, 88; *Dupuy v. Roebuck*, 7 Alab. 488; *Martin v. Atkinson*, 7 Georg. 237; *Tuite v. Miller*, (Ohio,) 5 West. Law Journal, 413, (quoted also in *Johnson v. Obertz*, 17 Ohio, 69; and see *King v. Kerr*, 5 Ohio, 160, whose decision it was said in *Johnson v. Obertz*, was controlled by the local "occupying claimant law.")

In *Leary v. Durham*, 4 Georgia, 593, after land had been conveyed with a general covenant of warranty (expressed substantially in the form given in a former part of this chapter,) the widow of a former owner made application under the local statutes for an admeasurement and assignment of dower, upon which commissioners were regularly appointed, and their return was made the judgment of the Court, which directed a writ of possession to be issued upon application of the demandant. The plaintiff (the assignee of the covenantee) rested his case here, with proof that the injury to the land was four or five hundred dollars, and that his covenantor had notice of the pendency of these proceedings. On the trial the Judge ordered a nonsuit, on the ground (among others) that there had been no eviction. But the judgment was reversed by the Supreme Court, and Lumpkin, J., in delivering the opinion of the Court, after referring to the local provisions as to assignment of dower, held the following language: "All of this has been done in the present case, except that the record furnishes no evidence that a writ of possession has ever issued. The legal presumption is, that none was needed, and that the tenant surrendered voluntarily. The witnesses testify that Leary, the plaintiff, has been injured some four or five hundred dollars. We think that the case should have been submitted to the jury. After the judgment of confirmation by the Court, not only the actual, but the market value of the premises has diminished to the extent of the worth of the dower. The tenant would have subjected himself to the payment of rent, by holding over. The judgment of the Court had settled the fact, that there was an outstanding and better title than Durham's, to a portion of this land. The existence of this claim was an incumbrance, ascertained and fixed by law, and was, in our opinion, such a breach of the warranty as to authorize a suit: not to recover nominal damages only, but indemnity for the actual injury incurred. If the formal entry of a mortgagee for foreclosure, though made under a statute which does not require that the possession of the mortgagee should be continued, is a breach, (9 Mass. Rep. 495; 16 Pick. 56,)

It may, perhaps, be said that there should be a distinction taken between a *lease* and a *purchase* of the paramount title by the covenantee, inasmuch as in case of a lease, it is in legal construction the holder of the paramount title who is in possession, the possession of the tenant being that of the landlord, while in case of a purchase the possession remains in the covenantee. To this it may be answered, that although in the latter case the covenantee in reality remains in possession, yet that he is supposed to have been actually ousted, (whereby all connection with his former title is dissolved,) and then to have been reinstated under the other title.¹

We turn now to the last question under the head

the conclusion is irresistible, that the proceedings in this claim of dower would sustain the present suit."

But it may be doubted whether the judgment of nonsuit in this case was not properly entered. If indeed the plaintiff had proved that he "had surrendered voluntarily," the above remarks would have been perfectly correct. So, if there had been evidence that he had paid four or five hundred dollars, (such was the ground of the decision in *Donnell v. Thompson*, 1 Fairf. 170, and *Tuite v. Miller*, 5 West. Law Journal, 413; in *Davis v. Logan*, 8 B. Monr. 342, there was, in Equity, an adjustment of all titles and settlement of damages, all the parties to the title being before the Court,) but the testimony of the witnesses seems to have merely been, that by the proceedings, the market value of the land was diminished by that amount, that is to say, the covenantee, would before a resale of the premises by himself, be obliged to discharge the incumbrance, or have its price deducted from the purchase money he would receive, and until these events had actually happened it would seem that he had no right to more than nominal damages. The case is worthy of consideration as evincing a strong desire in that State to make the covenant of warranty as comprehensive as possible, and the course of decision in South Carolina, (see *McCay v. Collins*, 2 N. & McC. 186, and *supra*, page 194,) where this covenant is treated as a covenant for seizin, and an eviction held unnecessary to its breach, cited with approbation.

¹ *Poyntell v. Spencer*, 6 Barr, 257; see this case, together with others in Pennsylvania, noticed particularly under the next head. It seems hardly necessary to remark, that in every case in which an eviction would be held to be caused by the purchase of the paramount title, the damages would be measured by the amount which had been fairly and *bona fide* paid for this purpose, and could never exceed that amount.

of constructive eviction, which is, whether it will be a sufficient eviction if the covenantee purchase or accept a lease under the paramount title, with no actual change of possession, and when the title has never been established by a judgment or decree? It will be remembered, that in considering the third class of cases under the head of actual eviction, no distinction was made between a voluntary retirement when the title was, or when it was not established by a judgment, the only difference being that when there was no such judgment, the covenantee retired at his peril, with the burden of proving that the adverse title was one to which he would have been compelled to yield. Where there was a judgment, it was held by some cases to be *prima facie* evidence of this, and when the covenantor had proper notice of the action, it was conclusive evidence of the better title. I should not, therefore, class by itself the question now to be considered, were it not that when there is no judgment or decree of a court of competent jurisdiction, it may be objected that every door seems open to fraud—that a party may receive the possession of land with a covenant of warranty, and may, without ever having left that possession, collusively purchase in any title, and then sue upon his covenant. To this it may briefly be replied, that when fraud is intended, it is easy to hide it behind a judgment, or decree of a court. It is impossible for courts to give severe scrutiny to every decree or judgment which they pronounce where there is a *prima facie* right to such a judgment on one side, and no denial of that right on the other; nor, even if they had the power, would it be proper to do so. But this very circumstance has given rise to the familiar rule, that although the

judgment of a court of competent jurisdiction, acting within the scope of its authority, cannot be inquired into collaterally, but binds parties and privies to it, yet that it may always be impeached on the ground of fraud.¹ Now there would seem to be no means by which a covenantor could possibly be injured by an affirmative answer to the question under inquiry. Even where there is no pretence of fraud or collusion, there seems but a single case in which, in the action on the covenant, the whole question of title cannot be gone into; and that is where the party bound by the covenant refuses, upon proper notice, to come in and defend. Having thus, by his own *laches*, lost the advantage of trying the question of title then, he must suffer for his neglect afterwards; and even under these circumstances, the plaintiff is obliged to prove that the adverse title is not one derived from himself.²

Indeed, in proportion as the conclusiveness of the judgment is increased, the temptation to fraud will increase also, and it is therefore most for the interest of the covenantor that as little effect as possible be given to a judgment to which he has not been a party or privy. But the advantage sought to be obtained by the covenantee from a collusive judgment can always be counteracted. Such an advantage must be sought to be gained, if at all, by enabling him to purchase in the paramount title at a low price, and then recover from the covenantor the full consideration paid for the premises. But by limiting the damages, as is done in the case of the covenant against incumbrances, to the actual amount thus

¹ And, of course, the rule applies as well to such actions as are now spoken of, as to others. *Wilson v. McElwee*, 1 Strobb. 66.

² *Supra*, page 206.

paid¹ every temptation to fraud is precluded, and the covenantor is always allowed to give, in mitigation of damages, evidence of what the plaintiff has paid to buy in the outstanding title,² and if the amount which he has thus paid be a nominal one, his damages will be nominal also.³

But, it may be asked, what then is the practical distinction between a covenant of warranty and a covenant for seizin, or against incumbrances?

The answer to this is, that under the latter covenants the purchase of the adverse claim has nothing to do with their breach. If the title be defective, or if an incumbrance exist, these covenants are broken as soon as made, and the purchaser has then a right of action which, as such, is not affected either beneficially or injuriously by the purchase of the paramount claim. Such a purchase merely affects the question of damages. The question whether the claim is or is not asserted, and if asserted, to what extent, has nothing to do with the right of action—it is sufficient that such claim exist.

But under the covenant of warranty or for quiet enjoyment it must not be supposed that a purchaser can, as a general rule, buy in any paramount claim, and elect to consider himself evicted to the extent of the purchase money of such claim. However far the doctrine of constructive eviction may be supposed to have been carried, it is believed to be still absolutely necessary that the adverse claim should have been hostilely asserted. It is not necessary that the asser-

¹ Haffey's Heirs v. Birchetts, 11 Leigh, 88.

² Tufts v. Adams, 8 Pick. 550; Cole v. Lee, 30 Maine, 392.

³ Leffingwell v. Elliott, 8 Pick. 457; S. C. 10 Pick. 204; Loomis v. Bedel, 11 New Hamp. 87.

tion should be made by a judgment or even a suit, any more than it is necessary that an eviction, when actual, should be under legal process.¹ The effect of a judgment, a decree, or a suit, is in this relation no more than an unequivocal assertion of the right by the paramount claimant. According, therefore, to the weight of authority at the present day, the distinction is not whether there has, or has not been a judgment in favour of the paramount claim, but it is whether such claim has or has not been adversarily asserted.

This was exemplified in a case in Pennsylvania,²

¹ See *supra*, p. 213.

² *Patton v. McFarlane*, 3 Penna. 425. "If a recovery in this case upon the covenant of general warranty," said the learned judge who delivered the opinion of the Court, "can be supported without either allegation or proof of an eviction, it would, in effect, be deciding that the covenant of general warranty contains within it each of these five covenants for title, which would be a novel idea to conveyancers and professional men. Because I cannot conceive of any defect or objection that can be discovered which may affect either the possession or the sufficiency of the title to invest the vendee completely with the estate professed to be conveyed, that may not, with as much propriety as the present case, be embraced in and considered as provided against by the covenant of general warranty, and an action supported for a breach of it, without either averring or proving an eviction. It comes to this, that the covenant of general warranty may either be considered as a covenant of seizin, of good right to convey, of quiet enjoyment, of indemnity against incumbrance, or for further assurance, as may best suit the wishes of the vendee. But it has been decided by the Supreme Court of the State of New York, when composed of judges alike distinguished for their talents and legal intelligence, that a general warranty contained no covenant of seizin, either express or implied. *Vanderkarr v. Vanderkarr*, 11 John. Rep. 122. It was the inaptitude of the covenant of general warranty to accommodate itself to the various intentions of the parties, as well as the circumstances connected with the titles to the land, that first gave rise to these special covenants, and recommended them to general use, which repudiates the idea of their being contained within it. . . . Although the Commonwealth had a claim against the land in the case under consideration, yet she had taken no step whatever after the conveyance of it to McFarlane, to enforce the payment of the money. Whether she would have done so, was uncertain, and Patton had a right under his covenant of warranty with McFarlane, to avail himself of all the indulgence that might be given by delay on the part of the Commonwealth to proceed

where a covenantor having neglected to pay the purchase money due to the Commonwealth, it was voluntarily and without claim being made by the latter, paid by the covenantee, who, it was held, was not, under these circumstances, entitled to recover upon his covenant of warranty, as the possession had never been disturbed or threatened.

So in the later case of *Dickinson v. Voorhees*,¹ the Court held that "until an eviction of the grantee, or a demand made of the land from him by one having a better title for it, the covenant of warranty could not be said to be broken."

On the other hand, in *Loomis v. Bedel*,² the plain-

against the land, to have the money collected by a sale of it. Although it may be considered certain that the payment of the money would have been compelled some day or other, yet it might make some difference to Patton whether he was to be called upon immediately, at the will of McFarlane, for payment, or to have it postponed to a distant day by forbearance on the part of the Commonwealth to proceed to collect it." So far, however, as this case approved *Waldron v. McCarthy*, 3 Johns. 464, it should be observed that that case has been since distinctly overruled in *Pennsylvania, Brown v. Dickerson*, 12 State Reports, as well as elsewhere, (see *infra*, p. 246, and would not be recognized as law at the present day in New York. *Hunt v. Amidon*, 4 Hill, 349.

So in a very recent case in Missouri, *Shelton v. Pease*, 10 Missouri, 482, it was said, "Among the numerous cases which are to be met with on this subject, both in the United States and in England, I have met with none in which a mere payment of money for the purpose of buying in a paramount title or extinguishing a mortgage, has been held to be a breach of the covenant of warranty. The case of *Sprague v. Baker*, 17 Mass., 586, seems to countenance this idea to some extent, but even in that case, whose authority has been much questioned, the payment of the mortgage was made under threats of a suit for possession." It was not, however, necessary to deny the authority of *Sprague v. Baker*, which, on examination, will, it is thought, be found to have been correctly decided. (See *supra*, p. 237.) Nor am I aware that the authority of that case has on this point been questioned. It has been virtually overruled in Massachusetts, on another and totally different point, viz: the capacity of the covenant against incumbrances for running with the land. See *infra*, Chapter VIII.

¹ 7 Watts & Serg. 409.

² 11 New Hamp. 74.

tiff in his action on the covenant of warranty proved a prior conveyance by his covenantor of part of the premises to other parties. The land was wild and uncultivated, and there was no actual possession by any one. Upon the death of one of the prior grantees, his interest in the land was sold by his administrator at public sale, and purchased by the plaintiff, and Parker, Ch. J., in delivering the opinion of the Court, held that these facts constituted an eviction.¹

¹ "It seems to be generally settled," said he, "that in order to support an action upon a covenant of warranty, there must be something more than evidence of an outstanding paramount title. There must be an assertion of that title, and an ouster, or disturbance, by means of it. But no technical eviction by a judgment at law is necessary, nor is any resistance of the paramount title, legal or otherwise, required, to the maintenance of an action upon the covenant. It is well settled, that an entry under the paramount title amounts to a breach of a covenant of warranty. And the grantee may upon demand surrender the land to a claimant having a good title, and resort to his action. 4 Mass. Rep. 349, *Hamilton v. Cutts*. But in *Waldron v. McCarty*, 3 Johns. Rep. 464, where there was an outstanding mortgage at the time of the conveyance to the plaintiff, and the premises were afterwards sold upon the mortgage, in pursuance of a decree of the Court of Chancery, and purchased by the plaintiff, who then brought his action upon the covenant of warranty in his deed, the Court held that an entry and expulsion were necessary, and that there was no sufficient eviction or disturbance of the possession. In our opinion, this is carrying the principle too far. If the claimant holding the paramount title should enter upon the land, and the grantee should thereupon yield up the possession, he would immediately have a right of action upon the covenant of warranty in his deed; and this right would not be barred or forfeited should he forthwith purchase the premises from the claimant, to whose superior title he had thus yielded the possession. He might on such purchase immediately re-enter into the possession, and still maintain his action on the covenant. If, instead of this formality, he yields to the claims of a paramount title, and purchases without any actual entry of the claimant under it, where is the substantial difference? For all practical purposes, his title under the grant to which the covenant is attached, and under which he originally entered, is as much defeated in the one case as in the other. He is in fact dispossessed, so far as that title is concerned. He is still in possession, but he is so under another title, adverse and paramount to his former one; and his purchase is, therefore, equivalent to an entry of the claimant. It is an ouster by his consent, and a re-entry by himself, under the superior title,

So in a very recent case, in Pennsylvania,¹ where a mortgagor conveyed premises bound by the mortgage, and reserved to himself a ground rent, covenanting that the purchaser should at all times thereafter freely, peaceably and quietly have, hold and enjoy the premises without any molestation, interruption or eviction of the grantor or his heirs, or any one claiming under him or them, or by or with his or their acts, means, consent or procurement. The purchaser sold to the plaintiffs, one of whom, upon the premises being advertised at sheriff's sale under proceedings on the mortgage, purchased them and took a deed to himself. Notwithstanding there had been no change whatever in the possession, it was held

without going through with what would be at best a mere formality, where, conscious of the defect of the title under which he originally entered, he chooses to yield peaceably to the assertion of a better title, and to purchase it.

The grantor who conveys a defective title, with a covenant of warranty, has no reason to complain of this. No action can be maintained against him upon his covenant, in such case, except upon proof of the actual existence of a title superior to the one he conveyed, and which his grantee could not withstand at law; and if that proof is made out, with evidence that the title was asserted and yielded to, why should he be permitted to insist there must be a formal surrender of the possession, or actual entry, and that if this was not done there could be no breach of his covenant? How would his interests be benefitted by the going out, and going back again? The ouster, so far as holding under his title is concerned, is as effectual by a purchase without actually leaving the premises, as it could be by peaceably leaving them, or even by an expulsion through the operation of legal process. 17 Mass. Rep. 590, *Sprague v. Baker*.

The judgment in this case was however properly set aside by the Court on the ground of the measure of damages, the Court saying that there was no evidence of the amount which had been paid by the plaintiff for the purchase of the property, and that his damages must be limited to that amount unless it exceed the value of the land.

¹ *Brown v. Dickerson*, 12 Penn. State Reports.

that a sufficient eviction had been caused to entitle the plaintiffs to recover.¹ The law has been so

¹ "It is true," said Burnside, J., who delivered the opinion of the Court, "that the covenant for quiet enjoyment goes more particularly to the possession than to the title. Hence, to have a breach of it, ordinarily, it is necessary to give evidence of an entry upon the grantee; or of expulsion from the premises; or some actual disturbance of the possession, (2 Sugden on Vendors, 10th ed., 514 to 522,) by reason of some adverse right existing at the making of the covenant, not of one subsequently acquired. *Ellis v. Welch*, 6 Mass. 246. Proof of the demand of possession on a superior right, will not be deemed sufficient on which to found the action; to maintain it, the plaintiff must exhibit an assertion and proceeding on that title, an ouster or disturbance by means of it; but a technical ouster on a judgment at law, is not absolutely necessary. 2 Greenl. Ev. § 243. Here, one of the plaintiffs was out of possession; and the other, in order to retain the possession, was forced to purchase at the sheriff's sale, and that to prevent such an ouster as would have kept him out forever. The rule as settled in *Waldron v. McCarthy*, 3 Johns. 464, has not met the approbation of the profession, in many States of this Union. It is too technical, and puts a grantee to unnecessary expense and trouble, and has been properly overruled in many of the Courts. We particularly refer to the learned and able opinion of Parker, Chief Justice of the Supreme Court of New Hampshire, in *Loomis v. Bedel*, 11 N. H., 74, where it is held, that where there is a conveyance with a covenant of warranty, and there is in fact a superior title, which is asserted by offering the premises for sale at public auction, and the grantee under the subsequent conveyance yields to the superior title and purchases it, this assertion of title and purchase is a sufficient ouster or disturbance to sustain an action on the covenant of warranty, notwithstanding there was no actual dispossession.

It is further ruled, that if one of several grantees under the subsequent conveyance, makes the purchase and remains in possession, all may have their action on the covenant. These principles are directly in point, and if respected, rule this case. The weight of modern authority is in accordance with them. *King v. Kerr*, 5 Ohio, 158, decides, that if the vendee in possession, (after a judgment in ejectment against him,) buys in the claimant's title, that is equivalent to an eviction, and an actual ouster is not necessary. See also 10 Ohio, 330, *Foote v. Burnett*. The same good sense is found in New Jersey, 4 Halst. 139-40, *Stewart v. Drake*. A mortgaged premises to B, and then sold them to C, with a covenant of quiet enjoyment; the premises were afterwards sold under B's mortgage to D, who was C's son-in-law and tenant in possession; D sold and gave possession to C; held an eviction, and in the opinion of the Court, there was an eviction when the premises were bought in by D. They have substantially adopted the same principle in Alabama. 9 Alab. 179, *Davenport v. Bartlett*. We therefore think the weight of authority is with the plaintiff, and the nonsuit ought to be taken off."

held under similar circumstances in many other cases.¹

There are, moreover, a number of cases² which decide that where an intermediate covenantee, who is himself a covenantor, has had damages recovered against him on his general covenant of warranty, he is entitled to recover those damages again from the party liable to him.³ And although it is well settled,

(For this case I am indebted to R. C. McMurtrie, Esq., who is preparing the volume for the press.)

It may be here observed, that the case of *Waldron v. McCarthy*, whose authority was denied in the above case, as well as in *Loomis v. Bedel*, 11 New Hamp. 74, and *Leary v. Durham*, 4 Georgia, 607, presented facts almost identical with *Brown v. Dickerson*. It decided that where land was sold under a judgment obtained upon a paramount mortgage and purchased by the party to whom it had been conveyed with warranty, this was not an eviction. The case has also been practically overruled in the State in which it was pronounced, by *Hunt v. Amidon*, 4 Hill, 349.

¹ *Hunt v. Amidon*, 4 Hill, 349; *Davenport v. Bartlett*, 9 Alabama, 179; *Leary v. Durham*, 4 Georgia, 607; *King v. Kerr*, 5 Ohio, 158; in this case the language is a little broad, Collet, J., saying, "The covenant of warranty includes the covenant against incumbrances." *Cole v. Lee*, 30 Maine, 392, can perhaps hardly be classed with these cases. The deed contained also, a covenant of quit claim, which, as was said in *Everts v. Brown*, 1 D. Chipman's R. 99, "is not precisely a covenant of warranty, nor is it a covenant of seizin, yet it partakes of the nature of that covenant, so that within certain limits, it is an engagement against every existing right, title, &c., paramount and adverse to the title supposed to have been conveyed to the defendant, although the same may never have been exercised or prosecuted for the actual disturbance of the plaintiff." Under this view of the covenant, it was held that the covenantee might seek out and voluntarily discharge a paramount mortgage. "He was not bound to wait until such means should be taken to deprive him of possession, when his remedy upon the defendant might be fruitless. But as under a deed containing the common covenant of warranty against incumbrances, he, as grantee, might remove them, and resort to the covenant of his warrantor, in an action for indemnification."

² *Booth v. Starr*, 1 Conn. 244; *Niles v. Sawtell*, 7 Mass. 444; *Markland v. Crump*, 1 Dev. & Bat. 94; *Chase v. Weston*, 12 New Hamp. 413; *Withy v. Mumford*, 5 Cowen, 141; *Herrin v. McIntyre*, 1 Hawks, 410; *Thompson v. Sanders*, 5 Monroe, 358.

³ This would be the limit. He would not be entitled to recover the consideration money he had paid: *Williams v. Beeman*, 2 Dev. 483; *Markland v. Crump*, 1 Dev. & Bat. 94.

that *before* such recovery (or other similar loss) an intermediate covenantee would have no such right, yet the same authorities, either expressly, or by necessary implication, recognize the intermediate covenantee's right to damages *after* such recovery against him, though in such case he has not been evicted from the land, but its proceeds.¹

These cases, though they certainly do not diminish the weight of authority as to constructive eviction, but rather tend to add to it, yet may be perhaps more properly referred to the principle that the first covenantor has engaged not only to warrant and defend the covenantee, but also his assigns.

From the preceding pages it would appear that the weight of authority is in favor of the position that a purchase by a covenantee of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction as will entitle him to damages upon his covenants for quiet enjoyment or of warranty, measured by the amount he has thus paid.²

There are, it is true, some decisions which at first sight do not appear to be in accordance with this proposition, and some dicta which are not quite reconcileable to it, but it is believed to be supported by the weight of modern authority.³

¹ See *Kinney v. McCullough*, 1 Sandf. Ch. 378.

² Although in *The Mayor of Poole v. Whitt*, 15 Meeson & Welsby, 571, it was said that the title to which a tenant would be justified in yielding, must be one which would support an ejectment, yet, as has been observed, the rights and obligations growing from the relation of landlord and tenant, do not exist as between vendor and purchaser.

³ *Witty v. Hightower*, 12 Smedes & Marshall, 478, involved a question of pleading merely. (See *infra*, p. 263.) In *Robinson v. Toncray*, 2 Robinson, 379, it did not appear that any hostile claim was made under the right of dower. In *Hunt v. Amidon*, 4 Hill, 348, Walworth, Chanc. merely decides

There are a few cases whose language might admit of misconstruction, and which therefore it seems proper to notice here. Thus, in Kentucky,¹ it was

that the grantee must not *voluntarily* give up to a stranger claiming by title paramount; and the decision itself was, that a sale under a judgment, and purchase by the covenantee, constituted an eviction.

In *Paul v. Witman*, however, (3 Watts. & Serg. 357,) Rogers, J., observed, "There must be a change of possession," which is unquestionably correct, but the change of possession may be a constructive one—there must be a cessation of enjoyment under the bad title, but it would seem an unnecessary prelude to the acquisition of a new enjoyment under the good title, to go through a form of ouster and re-entry. In *Paul v. Witman*, there was neither averment nor proof of anything to support even a constructive eviction, and hence the Court said, "A judgment in ejectment, without more, is not an eviction; there must be a change of possession. But if the declaration had averred an eviction, and the proof had been that the covenantee had actually retired before the judgment, or had been compelled to take a lease under, or to purchase the good title, it is possible that he might have been held entitled to recover."

In the case of *Poyntell v. Spencer*, 6 Barr, 257, Gibson, Ch. J., remarked, "Though a covenantee must actually go out of possession, to bring himself within the words of the covenant, he need not wait till he is thrust out. If, however, the preceding sentences are carefully read, it will be seen that this expression must not be construed too literally. These are, "If they (the holders of the better title) had actually turned him out, his relation to the vendor would have been dissolved, and he would then have unquestionably been at liberty to form a new one, by leasing or purchasing from them. But for what purpose execute a writ of possession and bring him back at the next moment, as a lessee or a purchaser? The ceremony would have been a ridiculous one. A forcible eviction on a recovery by title is not an indispensable ingredient in the breach of a warranty. The defendant may give way to such a recovery, and though he must actually go out of possession to bring himself within the words of the covenant, he need not wait till he is thrust out." From the next sentence, "here the defence being taken not on an eviction, but on the quality of the title, required no proof of ouster," it may be inferred that where the defence is taken on an eviction, proof of actual ouster would be necessary, but here in case of a subsequent lease or purchase, the ceremony of being ousted and then returning would seem equally a ridiculous one as in the case then under consideration. Nor does it appear that "the words of the covenant" absolutely require this ceremony. It is rather the narrow interpretation given to the term eviction by the earlier New York cases (which have since been overruled) that exacts such an actual ouster or retirement, and the law in Pennsylvania may be said to be now settled, by the case of *Brown v. Dickerson*, (*supra*, p. 246,) in according with modern authority.

¹ *Vanmetre v. Griffith*, 4 Dana, 92. See this case *infra*, p. 252.

broadly said, "it could not be disputed that if a vendee, before eviction, purchase in an outstanding paramount title, he cannot continue in possession under his first purchase, and claim damages as for a breach of warranty, on account of the title he has acquired." In a previous case¹ it was laid down by the Court, that "if a vendee acquire a paramount title under such circumstances, the most he can do in equity, is to show the advances made, and claim to be considered as the agent and trustee of the vendor in acquiring the adverse title, or (if the vendor refuse so to consider him) to surrender the possession acquired from him, and use the newly purchased title in warfare. He cannot continue in possession, and set up the new title in hostility to the old." But this language proceeds upon a misapplication of the familiar principle in equity, that if a mortgagee, executor, trustee, tenant for life, &c., *who have a limited interest*, get an advantage by being in possession, or "behind the back" of the party interested in the subject, he shall not retain the same for his own benefit, but hold it in trust.² This, however, it is believed, never was applied to the case of a purchaser, with reference to his remedy on his covenants for title, as he can have no interest in setting up or procuring an adverse title, except for the simple purpose of his own protection, and this protection the vendor has expressly covenanted to afford. The mistake has arisen from forgetting that the measure of damages is *not*, in such cases of purchase, the consideration money and interest (which would open every door to

¹ Morgan's heirs v. Boone's heirs, 4 Monroe, 297.

² Holeridge v. Gillespie, 2 Johns. Ch. C. 33, &c.

fraud) but simply the amount which has been paid to purchase the paramount title.¹

¹ The cases of *Venable v. Beauchamp*, 3 Dana, 323, and *Coleman v. Coleman*, id. 403, decided no more than that one tenant in common could not, before eviction, purchase in an outstanding title to the prejudice of his co-tenant, but that the purchase must enure jointly to both. *Vanmetre v. Griffith* *supra* p. 250, was perfectly correctly decided. One who had received land with co-tenant of warranty, contracted with the paramount owner to buy in his title, in case it should prove, on legal investigation, to be the better one. Suit was brought against the covenantee, and notice given to the covenantor. Judgment was entered in favor of the paramount title by confession, and on a writ of possession, the sheriff endorsed that he had delivered the possession to the plaintiff's agent, who then delivered it to the covenantee, and the latter then sued the representatives of his covenantor, who had died in the mean time, and judgment was confessed for the amount of the original purchase money, with interest. For part of this judgment one of the administrators gave his own note, and paid the balance, and then upon discovering the contract which had been made between the covenantee and the paramount owner, and that the amount paid by the former for the title of the latter, *exceeded even what had been paid* on the judgment, filed his bill to restrain the collection of the balance of the judgment, and to refund the excess over the amount thus paid by the covenantee. The chancellor, under these circumstances, most properly decreed for the complainant, and the court of appeal affirmed the decree. With these facts in view, the remarks of Marshall, J., in the latter court, are perfectly appropriate: "If a judgment obtained," said he, "under such circumstances, and the effect of which, by operation of a previous contract made by the vendee, is to confirm the existing possession, by uniting the paramount title to it, shall be allowed to have the further effect of severing the possession from the title under which it was originally held, and rendering the original vendor liable upon his warranty, as for an eviction, whereby the vendee, beside the advantage of continuing in possession, may gain the difference between the amount recoverable upon the warranty, and the sum which he has given for the paramount title, it is obvious that he will have gained his advantage at the expense of his vendor, by a contract made while he was certainly in possession under the vendor's title, and while the obligations of fidelity and good faith belonging to the condition of a vendee in possession under warranty, were resting upon him in their full force and vigor. To establish such a consequence, would be to admit that a vendee in possession may, by a contract made for his exclusive benefit, place himself in hostility to the title under which he acquired and holds possession; and that he may, by means of the title and possession derived from his vendor, obtain an advantage at the expense and by the loss of the vendor." The results thus deprecated are, as has been said, prevented, or, as in this case, cured, not by denying

It may also be observed that cases sometimes occur where courts of equity have brought before them the

a covenantee any remedy upon his covenant, but by strictly limiting his damages to the amount paid by him for the better title. The case of *Woodward v. Allen*, 3 Dana, 164, though perhaps more properly classified under the preceding head, may be referred to as showing that the law in Kentucky is in harmony with the more modern authorities elsewhere. In that case, there was a covenant for restitution of the consideration money if the land should be lost. "If it be admitted," said Robertson, Ch. J., "that a covenant to be responsible if the land is lost, is tantamount to a covenant of general warranty, and that, therefore, an eviction would be indispensable to the plaintiff's right to maintain this action, still we are clearly of the opinion that he proved on the trial every fact that was necessary to entitle him to a judgment. He exhibited a judgment of eviction in an action of ejectment, and proved that the defendant as well as himself was a party to the ejectment, that the judgment was for the land embraced by the covenant, and that he had, after the judgment, surrendered to one of the lessors, and leased the land of him."

The case of *Johnson v. Nyce's Exr.* 17 Ohio, 66, deserves notice in this connection. The declaration averred a right of dower in the widow of a prior owner of the property, and upon her petition for dower being filed, the covenantee took defence, "and such proceedings were had therein that afterwards, at November Term, dower in all of said lands and premises was duly assigned and confirmed unto the said J. M. at the gross sum of \$137.50, which the plaintiff was thereby ordered to pay to the said J. M., in full for her dower, &c., in sixty days after said November Term, and in default thereof that execution issue as upon judgments at law, by means whereof the plaintiff has paid, and been liable to pay," &c. On demurrer it was held that this was no eviction. "We do not doubt," said Hitchcock, J., "that the covenant in the deed is sufficient to cover a claim for dower, provided the same be prosecuted to such a result, that the covenantee is thereby deprived of even the temporary possession of the whole or any part of the land conveyed. It may be thought that a covenant against incumbrances is the appropriate covenant to meet such a case, but it is equally well met by the covenant of warranty. In order, however, to maintain an action upon the latter covenant, there must, as a general rule, have been an eviction, and this fact should appear from the declaration. There are exceptions, it is true, to this general rule, and in particular cases other matters have been held to be equivalent to an eviction. In the case of *King v. Kerr's Administrators*, (5 O. R. 154,) the Court say, in speaking of the covenant of warranty, 'this covenant is not broken until the grantee, his heirs or assignee, is evicted from, or disturbed in the enjoyment of the premises, or a part of them, by the setting up of a superior or paramount title.' Still, in that case it was determined that where, after a judgment in ejectment, the tenant remains in possession, claiming payment for improvements, under the occu-

whole question of title, and all the parties are before the court. In these cases, where an equitable adjustment of all conflicting claims can be made, and compensation awarded, either by reference to a master,

pying claimant law, and while so remaining in possession, purchases in the paramount title, the tenant may have an action upon the covenant of warranty, against his grantor, although not actually evicted. In making this decision the Court was controlled by the principles of the occupying claimant law. Under that law the occupant cannot be dispossessed until paid for his improvements. And if the claimant should neglect to make payment, the occupant must either lose the benefit of his improvements, or be delayed in the proceeding under his covenant. The Court held that this case might be well considered as an exception to the general rule, that no action could be sustained until actual eviction."

The case of *Tuite v. Miller*, 5 West. Law Journal, 413, was then mentioned and approved. In that case one-third of the rents and profits of the land had been set off to the widow for her dower, and made a charge upon it, and it was ordered that unless payment was made the land should be sold. This was held equivalent to an eviction. But it was said, in *Johnson v. Nyce's Exr.*, that in the case then before the Court there was no assignment of dower by metes and bounds, nor according to the local statute, of one-third of the rents. "The statute seems to have been entirely disregarded. True, a decree was made in the widow's favor against the plaintiff for \$137.50, which was to be in full of dower. This, however, was not made a charge upon the land, and could in no shape act as incumbrance upon it. It was a mere personal debt to be enforced by execution. . . . It has no operation to incumber the land. Had the one-third part of the land been set off by metes and bounds, and the widow put in possession, or had dower been assigned according to the statute, as in *Tuite v. Miller*, then the plaintiff might have had redress on the covenant of warranty. But as the case is now presented, he can have no such redress."

This case should be read in connection with the one next reported, viz.: *Nyce v. Obertz*, p. 71. The circumstances were the same as in the previous case, except that the covenant sued upon was that against incumbrances, which was held not to be broken. This case has been commented on in a former chapter. *Supra*, p. 111.

It is evident from an examination of these two authorities, that they were decided under special circumstances, and do not weaken the liberality of construction accorded to the term eviction in *Tuite v. Miller*. The Supreme Court seem to have determined, owing to the apparent disregard of the provisions of the local statute as to dower, by the court which had pronounced the decree, that no recovery should be had under these circumstances upon any of the covenants for title. With this end the case of *Nyce v. Obertz* went very far.

or, if necessary, by issues of *quantum damnificatus*, the rule as to eviction is more relaxed, and it seems not necessary that even a payment to purchase the better title should have been made, but the paramount *right* having been established, the amount of damages is equitably adjusted, without making this essential.¹ Such cases, however, it must be observed, are exceptional, and occur, perhaps, only when all the parties to the title are before the Court, and their respective rights are capable of equitable adjustment.

In reviewing the numerous cases upon the subject of what constitutes an eviction within the covenant of warranty, it seems proper again to recur to the remark which has elsewhere been made, that covenants for title should not, and cannot be regulated in every, or even in most cases, by the artificial and technical rules which properly govern the law of real estate. Reference may be had, therefore, not only to the intention of the parties as expressed in the conveyance which contains the covenants, but also to the local practice of conveyancing itself. In those parts of this country, if any such should exist, where the refinements of English conveyancing prevail, and the covenants for title are inserted with exactness and fullness, the inference would be strong that the omission of a covenant for seizin, or against incumbrances, was a proof that it was not within the terms of the contract that the purchaser should enjoy the peculiar benefit which such a covenant strictly confers, and the more exactly and particularly the covenants were expressed,

¹ Such was the case in *Davis v. Logan*, 8 B. Monroe, 342, and *Coster v. The Manufacturing Co.*, 1 Green Ch. 467, where a decree for dower in the one case, and a judgment in the other, were held sufficient, without either actual or constructive eviction under them.

the more rigid would be their construction. So far, however, from such being the practice of conveyancing in this country, it is rarely, if ever, the case that the covenants for title which are inserted are expressed otherwise than very briefly. So, in many of the States long settled usage has caused the omission of all the covenants for title, except that of warranty, which, by common practice at least, is looked upon as containing all that is necessary to assure the purchaser. Such is the case in Pennsylvania, even in the larger towns, where, except as to the form of the deed, so much of the practice of English conveyancing as is suitable to local laws prevails. The title is, in a case of any importance, submitted with an abstract, or at least a brief, for the opinion of counsel, and carefully examined. Since equity jurisdiction has been to some extent conferred, the law as to specific performance applies more closely, and in general the rules which govern the relation of vendor and purchaser before the execution of the conveyance are accurately defined, and are or can be readily understood. Yet with all this, the covenant of warranty is, except in very rare and particular instances, the common and the only covenant for title which the deed contains. The same is believed to be true of many other States. Where such has become the settled practice of a State, it is suggested, with great deference, that technical rules, based upon a different custom of conveyancing as respects these covenants, lose to some extent their application, and to say that "the purchaser should have protected himself by other covenants," is to apply a hard rule in States where those other covenants are never employed. Nor do such decisions reform the practice and bring

into use those other covenants. It generally happens that eventually it is the course of decision, and not the usage of the community that changes, and in the mean time the position of purchasers is unenviable. That the course of decision in a State, and the practice of the community or legal profession of that State should be at variance, is a condition of things productive of great harm. It can seldom last long. The former generally yields, either to legislation or the practical difficulties to which such a course of decision leads.

It is not meant in the application of these remarks to advocate a general departure from established and technical rules as to the construction of covenants for title. On the contrary, these rules can, in most instances, be applied with entire propriety. All that it is intended to suggest is, subject to correction, that where the covenant of warranty is habitually the only covenant for title contained in conveyances, such a construction should be given to that covenant as will rather tend to indemnify the purchaser than to protect the vendor. This may be done without giving to the covenant of warranty the attributes of a covenant for seizin. Such a course has been tried in South Carolina and Ohio, and been found inconvenient in the former and abandoned in the latter. But where a vendor has sold land with a defective title, and covenanted (according as the usage of the country interprets the covenant) that it is perfect, and that he will warrant it to the purchaser, it seems hard to decide that the latter may not, upon the hostile assertion of the adverse claim, quiet his title, and then be indemnified to the extent of the amount reasonably and *bona fide* paid for that purpose.

And the course of decision in most States is in accordance with these remarks. The earlier and rigid cases in New York¹ have yielded to later and more liberal decisions,² and the current of authority has fairly set in favor of the doctrine of constructive eviction.

A branch of this subject of eviction is that of the purchaser's right to detain the unpaid purchase money by reason of a defect of title. Such a right depends (except in Pennsylvania) upon the defect in question coming within the covenants for title he has received, and is, according to the weight of modern authority, sanctioned to the extent to which the purchaser would be, at that time, entitled to damages upon the covenants. This subject is attempted to be fully considered in a subsequent part of this work,³ where it will be seen that although there are many cases which profess to lay down a strict rule, and to deny this right "unless there has been fraud or an eviction," yet there are few, if any, which deny the purchaser the right to set off the amount *bona fide*, reasonably, and necessarily paid by him to buy in the paramount title, even where the only covenants are those for quiet enjoyment or of warranty.

The question as to whether a covenant of warranty is to be so construed relatively to the quantity of land conveyed, so as to be deemed an assurance to the pur-

¹ Greenby v. Wilcocks, 2 Johns. 1; Waldron v. McCarthy, 3 id. 473; Kortz v. Carpenter, 5 id. 120; Vanderkarr v. Vanderkarr, 11 id. 122; Kerr v. Shaw, 13 id. 288; Lansing v. Van Alsteyne, 2 Wendell, 563; Webb v. Alexander, 7 id. 255.

² Hunt v. Amidon, 4 Hill, 349; Greenvault v. Davis, 4 Hill, 643; Kinney v. McCullough, 1 Sandf. Ch. 378; Withers v. Codwise; reported in Banks v. Walker, 2 id. 350.

³ See Chapter XIII.

chaser of the existence of that quantity, will in many cases depend upon the manner in which the particular deed is expressed. The subject is considered in a subsequent chapter.¹ It may be here mentioned, however, that as a general rule, unless where the enumeration of quantity is of the essence of the contract, and not matter of description merely, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed.²

In considering the scope of this covenant, the case of *Mitchell v. Warner*,³ deserves some attention. That case in substance decided, that a covenant to warrant and defend land will not extend to the water which covers it. A tract of land, through which ran a stream of water, having been conveyed with covenant of warranty, the water was, by one having the right to do so, diverted from the land, which had in the mean time passed to an assignee, who then sued upon the covenant. The case was twice elaborately argued, and two opinions were pronounced by Hosmer, Ch. J., one of which decided that a covenant which was otherwise properly capable of running with the land, would not run if its breach related to water; and the other held that a warranty did not extend to hereditaments, but was limited to lands and tenements, and although authorities were cited to show that, at common law, warranty extended to rents, commons, "and all things issuing out of the land," and incorporeal hereditaments, yet it was said by the Court, that the

¹ See Chapter X.

² *Mann & Toles v. Pearson*, 4 Johns. 41; *Powell v. Clark*, 5 Mass. 357; *Smith v. Evans*, 6 Binn. 106; *Perkins v. Webster*, 2 New Hamp. 287; *Whalton v. Kauffman*, 19 Johns. 97; *Lorick v. Hawkins*, 1 Richardson, 417; *Whitehall v. Gotwalt*, 3 Penn. Rep. 331 (overruling *Christine v. Gotwalt*, 16 Sergt. & Rawle, 112); *Roat v. Puff*, 3 Barbour's Sup. Ct. R. 352; *Banskett v. Jones*, 2 Spears, 68.

³ 5 Conn. 497.

expression "all things," referred to rents, commons, &c., which may come under the head of tenements. The distinction here observed between incorporeal hereditaments which are tenements, and hereditaments which are not tenements, seems never to have been taken in any of the former authorities;¹ and to deny the benefit of a covenant of warranty in a case of this kind, because water was not a tenement, as not being of a permanent nature, seems based upon a narrow distinction, and calculated much to contract the usefulness of the covenant.² It may indeed be that water cannot be sued for by itself, *eo nomine*, but since "if a man grants all his lands, he grants thereby all his mines of metals and other fossils, his woods, *his waters* and his houses, as well as his fields and meadows, and by the name of land, which is *nomen generalissimum*, every thing terrestrial shall pass,"³ it would seem natural to suppose that, when a warranty accompanied such a grant, it extended over its whole subject matter.

Hence, where⁴ the plaintiff in an action on his grantor's covenant of warranty, offered to prove that there had been a house on the premises at the date of the deed, which had since been removed by a former tenant, under a prior agreement between the tenant and the grantor, by which the former was to be at liberty to remove the building whenever his time expired, it was held, that the mere statement

¹ Bally v. Wells, 3 Wils. 26; Shep. Touch. 184; Pomfret v. Ricroft, 1 Saunders, 322.

"A warranty indeed," as is said in the Touchstone, 184, "may be annexed to estates of inheritance or freehold; and that not only of corporal things which pass by livery, as houses, lands, and the like, but also of incorporeal things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements."

² See *supra*, p. 115. ³ 2 Black. Com. 18. ⁴ West v. Stewart, 7 Barr, 123.

of the case was the strongest argument that the removal was a breach of the covenant. "What," said Coulter, J., "is a more thorough eviction than the absolute removal or destruction of the property conveyed, if the act is done in pursuance of a title superior to that of the grantor at the date of the deed? and what would constitute a more complete breach of the covenant against the grantor and his heirs, than the removal of the house by a title derived from him, anterior to his deed to the plaintiff?" and there had been a prior decision to the same effect in Kentucky, with respect to the removal of a log cabin.¹

As respects the rules of pleading on this covenant, it may perhaps be considered as well settled, that whatever may be the facts necessary, or sufficient, on the trial to support the issue of eviction, an eviction itself must be set forth in the declaration. "There can be," said Gibson, J., in *Clark v. McAnulty*,² "no breach of the covenant of warranty assigned, without alleging an actual eviction. It is true that evidence of a paramount title, and that the warrantee, in consequence, yielded up the possession, will support such an allegation. . . . Still, however, an actual ouster must be set out." So in *Patton v. McFarlane*,³ it was said by Kennedy, J., "I consider that an eviction must be alleged in all cases, although it may be supported by the proof of particular circumstances: but it will not do to state the circumstances themselves; the averment must be according to their legal effect. For instance, an eviction might be alleged in the de-

¹ *Combs v. Fisher*, 3 Bibb, 51, and see accord. *Mott v. Palmer*, 1 Comstock, 527, cited *supra*, p. 64.

² 3 Serg. & Rawle, 372.

³ 3 Penn. R. 419.

claration, but, on trial, may be shown by proof of an elder and better title than that which was transferred by the vendor, and that the vendee voluntarily, upon the demand of him who had such better title, gave up the possession of the land to him." So in *Paul v. Witman*,¹ Rogers, J., said, "The averment of an eviction is one thing, the evidence of it another."²

¹ 3 Watts & Serg. 407-410.

² So in *Witty v. Hightower*, 12 Smedes & Marshall, 478. There are some cases which appear, at first sight, to establish a different rule. *Grannis v. Clark*, 8 Cowen, 36, was decided on the ground that the action being on the covenant implied from words of leasing, an allegation of eviction was unnecessary, as the covenant implied was one of *power* to lease, as well as for quiet enjoyment. In *Day v. Chism*, 10 Wheaton, 449, the declaration did set forth that the defendants were "ousted and dispossessed." So in *Smith v. McCampbell*, 1 Blackford, 100. In *Banks v. Whitehead*, however, (9 Alab. 85,) where the breach alleged was a failure to get possession, the Court said, that "although the strictly formal course would have been to allege an eviction, we feel constrained to decide that the averments here are equivalent to the assertion of an actual ouster."

The following form of a declaration on a covenant of warranty is given by Professor Greenleaf: (Greenlf. Evidence, § 244.) It will be observed that the suit is brought by the assignee of the covenantee:—"For that the said defendant heretofore, to wit, on the ——— day of ——— by his deed, by him duly executed, acknowledged and recorded, which deed, not being in the possession, custody, or control of the plaintiff, he is unable to produce in Court, for a valuable consideration therein mentioned, bargained, sold and conveyed to one J. S. a certain parcel of land, (describing it,) to hold the same with the appurtenances, to him the said J. S., and his heirs and assigns forever; and in and by the same the said defendant, among other things, covenanted with the said J. S., and his heirs and assigns, to warrant and defend the same premises to the said J. S., and his heirs and assigns forever, against the lawful claims and demands of all persons. And the said J. S. afterwards, on the same day, lawfully entered into said premises, and by virtue of said deed became lawfully seized of the same; and being so seized, the said J. S. afterwards, to wit, on the ——— day of ———, by his deed, by him duly executed, acknowledged, and recorded"—(It is, in general, necessary that these assignments should be specially averred: *Williams v. Weatherbee*, 1 Aiken, 233; see *Bradley v. Knight*, 4 Verm. 471. It was held in *Niles v. Sawtell*, 7 Mass. 444, that where the interest of the covenantee has been assigned to another, the former, if he sue, must aver that he is liable to his assignees for the breach)—"and now here by the plaintiff produced in Court, for a valuable consideration therein mentioned, bargained, sold, and conveyed the said premises to the plaintiff, to hold the same

Upon the subject of the measure of damages for a breach of the covenants for quiet enjoyment and of warranty, there is great conflict of authority and practice. As respects this subject there is no difference in principle between these covenants, nor does it seem that any has ever been taken. In many States these covenants are treated as a substitute for the old warranty, upon which, in an action of *warrantia chartæ* or upon voucher, the warrantee recovered of his warrantor lands whose value was computed as at the time of the warranty, and the compensation upon the modern covenants is still measured by the same standard. But in other States the covenant is regarded as one of indemnification, which seeks therefore to compensate the party for his actual loss at the time of its breach.

It is scarcely necessary to repeat what was the common law rule. When the obligation of warranty was implied by tenure, the lord gave to his vassal in case of eviction other lands of equal value, whose measure was computed as at the time of donation.¹ Nor was the rule altered by the introduction of ex-

with the appurtenances to the plaintiff, and his heirs and assigns forever; by force of which deed the plaintiff, afterwards, and the same day lawfully entered into the same premises, and became lawfully seized thereof accordingly. But the plaintiff in fact says, that the said defendant has not warranted and defended the said premises to the plaintiff as by his said covenant he was bound to do, but on the contrary the plaintiff avers that one E. F. lawfully claiming the same premises by an elder and better title, afterwards, by the consideration of the Justices of the ——— Court, begun and holden, (here describe the term, &c.) recovered judgment against the plaintiff for his seizin and possession of said premises, and for his costs; and afterwards, to wit, on the ——— day of ———, under and by virtue of a writ of execution duly issued upon said judgment, the said E. F. lawfully entered into said premises, and thereof evicted the plaintiff, and still lawfully holds him out of the same." In Georgia there is a statutory form, the declaration being in the form of a petition: Digest of 1851, p. 492; Act of Dec. 27, 1847.

¹ Godbolt, 151; 1 Reeves' History of the Common Law, 446.

press warranties,¹ they went no further than the warranty whose place they supplied. From the absence of authority at the close of the seventeenth century, and since that time, it may fairly be inferred that in England the introduction of the covenants now in use worked no change in this rule.²

In this country, however, the rapid advance of improvement, and the comparative insecurity of titles, gave the question importance at an early day, and it will be found discussed among the very first of our reported cases.

It was held in some States that the damages should be measured by the value of the land at the time of the conveyance, and, in others, by its value at the time of eviction. The first position was supported by analogy to the common law, and the danger of introducing a less simple rule, and the latter by the usage of the particular province or State, and sometimes by reference to the civil law. The cases in support of the last position being less numerous will be first referred to.

The earliest authority appears to be *Horsford v. Wright*, the second case reported in Connecticut,³ where Law, Ch. J., said, "The constant rule of this Court has been to ascertain damages by the value of the land at the time of the eviction, though the British rule is to give the consideration of the deed.

¹ Gilbert's *Tenures*, 124. See *supra*, p. 69, et seq.

² By the case of *Lewis v. Campbell*, 8 Taunton, 728, which was an action brought upon a covenant for quiet enjoyment, it would appear that no cases in point had been decided, since none were cited by the counsel, and Dallas, Ch. J., says: "I very much doubt whether in any case a plaintiff can recover for the improvements and buildings he may choose to make and erect upon the lands . . . but I am of opinion that they cannot be recovered in this case, as the declaration was insufficient."

³ Kirby's Rep. 3.

The diversity in this respect is undoubtedly founded in the permanent worth of their lands as an old country, and the increasing worth of ours as a new country, and it is supposed that the purchaser goes on, improves and makes the land better till he is evicted." "Immemorial usage in Connecticut" is afterwards said to be the foundation of this rule, which has always been adhered to there.¹

So in Vermont, "this rule of damages was established at an early day."²

In Maine, "the same principles are established."³

In Massachusetts, *Gore v. Brazier*⁴ is the leading case. Parsons, Ch. J., there attempts to found the practice upon English authority, by saying that however convenient and proper the feudal rule might have been, yet that "when lands were aliened for money, when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on a real covenant of warranty."⁵ Neither of the authorities cited in support of these remarks,⁶ however, give a different rule of damages from that which existed before at the common

¹ *Mitchell v. Hazen*, 4 Conn. 516; *Sterling v. Peet*, 14; id. 204.

² *Drury v. Shumway*, D. Chipman's Rep. 111; *Park v. Bates*, 12 Verm. 387.

³ *Cushman v. Blanchard*, 2 Greenl. 268; *Sweet v. Patrick*, 3 Fairf. 1; *Hardy v. Nelson*, 27 Maine, 525.

⁴ 3 Mass. 523.

⁵ See *supra*, p. 189.

⁶ *Brownlow*, 21; 2 id. 164.

law. The decision in Massachusetts was based upon being "conformable to principles of law applied to personal covenants broken, to the ancient usages of the State, and the decision of our predecessors supported by the practice of the Legislature." Some of these decisions are referred to in the opinion, but are not to be found reported. The authority of *Gore v. Brazier* has, however, been consistently followed in Massachusetts.¹

In Louisiana the principle of the civil law is of course adopted.²

¹ *Caswell v. Wendell*, 4 Mass. 108; *Bigelow v. Forney*, id. 512; and (notwithstanding an apparent decision to the contrary in *Sumner v. Williams*, 8 id. 220,) by *Norton v. Babcock*, 2 Metcalf, 510; and *White v. Whitney*, 3 id. 89. In *Sumner v. Williams* the action was on the covenant of warranty. The Court refused to assess the damages by the value at the time of eviction, as contended for by the plaintiffs, but at the same time treated the case as if brought upon "covenants broken at the time of the execution of the deed," though, immediately after, it is said, "Moreover, if the action had been commenced on the covenants which respect the title, there is no doubt the measures of damages would have been the purchase money with interest."

² *Bissel v. Ermine*, 13 Louis. 148. The rule of the civil law (which in its endeavor to afford in every case a full compensation to the party injured necessarily was in many instances arbitrary and unsettled, and which as to warranty recognized no distinction between real and personal property,) may be found in the Dig. 19, 1, 45. "Illud expeditius videbatur; si mihi alienam aream vendideris, et in eam ego ædificavero, atque ita eam dominus evincit: nam, quia possum petentem (dominum,) nisi impensam ædificiorum solvat, doli mali exceptione summovere, magis est ut ea res ad periculum venditoris non pertineat. Quod et in servo dicendum est, si in servitutem, non in libertatem evinceretur, ut dominus mercedes et impensas præstare debeat. Quod si emptor non possideat ædificium vel servum, ex empto habebit actionem; in omnibus tamen his casibus, si sciens quis alienum vendiderit omnimodo teneri debet." See also 1 Domat, Part I. Book 1, Tit. II. § 15, 16, 17; 1 Cushing's Dom. 233. For the Scotch law, see 1 Erskine's Law of Scotland, Book II. title 3, § 13. "Absolute warranty in case of eviction affords an action to the disponent against the disponent, for making up to him all that he shall have suffered through the defect of the right, and not simply for his indemnification by the disponents returning the price to him," &c. Also Dictionary of Scotch Law, tit. "Warranty." See *passim*, Sedgwick on Damages, Ch. VI.

In New Hampshire and Indiana the question seems still unsettled.¹

The cases which support the opposite rule are much more numerous. In South Carolina the law was at first unsettled. Some early cases² adopted the rule which has just been referred to, but this was soon after departed from, and the measure of damages limited by the consideration money.³ By a statute, moreover, it is declared,⁴ that "in any action or suit at law or in equity for a reimbursement or damages upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation with legal interest," but it has been said⁵ that the rule of law was settled long before it was enacted.

So, in New Jersey, a decision at *Nisi Prius*⁶ allowed the plaintiff to give evidence of his improvements, in order to increase his damages, but in subsequent cases⁷ every allowance for improvements has been rejected.

So, in Virginia, an early case⁸ to the same effect as those in New England, was not subsequently fol-

¹ *Loomis v. Bedel*, 11 New Hamp. 87; *Blackwell v. Justices of Lawrence County*, 2 Blackf. 148.

² *Liber v. Parsons*, 1 Bay, 19; *Gerard v. Rivers*, id. 265; *Witherspoon v. Anderson*, 3 Desaussure, 245.

³ See an elaborate opinion of Brevard, J., in *Furman v. Elmore*, cited in 2 Nott & McCord, 189; as also *Henning v. Withers*, 2 Constitutional R. 585; *Wallace v. Talbot*, 1 McCord, 468; *Ware v. Wetherill*, 2 id. 415; *Earle v. Middleton*, Cheves Rep. 127; and the recent case of *Pierson v. Davis*, 1 McMullan, 37.

⁴ Stat. 17th Decem. 1824, § 4. ⁵ *Earle v. Middleton*, Cheves R. 127.

⁶ *Hulse v. Wainwright*, Coxe's Rep. 173.

⁷ *Stewart v. Drake*, 4 Halsted, 142; *Holmes v. Sinnickson*, 3 Green, 313; *Morris v. Rowan*, 2 Harrison, 304.

⁸ *Mills v. Bell*, 3 Call. 362.

lowed.¹ In *Stout v. Jackson*² the subject was elaborately examined, and the more safe rule of damages held to be to measure them by the value at the time of the conveyance, and this was considered as finally settled by the subsequent case of *Threlkeld v. Fitzhugh*.³

So, in Tennessee, the rule seems to have been not determined in an early case,⁴ but by recent authorities⁵ it may be said to be now settled.

The rule that the measure of damages on the covenants for quiet enjoyment and of warranty is limited by the consideration money and interest, may be said to be now settled law in the States of New York,⁶ Pennsylvania,⁷ North Carolina,⁸ Georgia,⁹ Kentucky,¹⁰

¹ *Nelson v. Matthews*, 2 Hen. & Munf. 164.

² 3 Randolph, 132, Coulter, J., dissented.

³ 2 Leigh, 463. See also *Jackson v. Turner*, 5 Leigh, 119; *Haffert's heirs v. Birchetts*, 11 id. 88.

⁴ *May v. Wrights*, 1 Overton, 385.

⁵ *Elliot v. Thompson*, 4 Humphries, 101; *Shaw v. Wilkins*, 8 id. 647.

⁶ *Bennet v. Jenkins*, 13 Johns. 50; *Kelly v. The Dutch Church of Schenectady*, 2 Hill, 116; *Kinney v. Watts*, 14 Wendell, 40; *Peters v. McKeon*, 4 Denio, 550; *Mr. Sedgwick (Damages, 168)*, mentions that the Revisers of the New York Statutes proposed to fix the measure of damages by the value at the time of eviction, with interest, costs, etc., but that the provision was not finally adopted.

⁷ *Brown v. Dickerson*, 12 Penn. State Reports; *Bender v. Fromberger*, 4 Dall. 441; *King v. Pyle*, 8 Serg. & Rawle, 166.

⁸ *Phillips v. Smith*, 1 Car. L. Repos. 475; *Williams v. Beeman*, 2 Dev. 483; *Nesbit v. Brown*, 1 Dev. Ch. 30. In *Williams v. Beeman* there was a neat application of the rule, it having been held that when an intermediate vendee sold at a less price than he gave, his vendee could recover of the original vendor only the purchase money which he had himself paid. See that case approved in *Markland v. Crump*, 1 Dev. & Bat. 94. *Nesbit v. Brown* went so far in support of the principle, that on an agreement that in case of eviction the covenantee should recover twice the consideration money and all costs, the Court held this a penalty, and that only the purchase money could be recovered.

⁹ *Davis v. Smith*, 5 Georg. 285. See an elaborate opinion by Nisbet, J.

¹⁰ *Strode's Heirs v. Cox's Heirs*, 2 Bibb, 279; *Booker v. Bell*, 3 id. 175; *Hanson v. Bucknor's Executor*, 4 Dana, 453.

Arkansas,¹ Iowa,² and Ohio,³ besides those which have just been referred to.

Such a rule has also been adopted by the Supreme Court of the United States.⁴

Some of the reasons which support these authori-

¹ *Logan v. Moulder*, 1 Pike, 323. ² *Stewart v. Noble*, 1 Greene, 28.

³ *King v. Kerr*, 5 Ohio, 154; *Foote v. Burnet*, 10 id. 317; *Clark v. Parr*, 14 id. 118.

In this State a statute, passed 10 March, 1831, called "The occupying claimant act," provides that occupying claimants, being in quiet possession of lands under title from some public office or deed duly authenticated and recorded, or under a tax title, or sale by order of Court, &c., shall not be evicted or turned out of possession by any person who shall set up and prove an adverse and better title, until the occupying claimant shall be paid the value of all lasting and permanent improvements made, &c.; unless the occupying claimant shall refuse to pay the value of the land without the improvements, if demanded by the successful claimant. See the act in full, in Statutes of Ohio, 607, edition of 1841. There were former statutes on this subject, which this supplied. If improvements are to be paid for at all, it certainly seems most rational that the expense should be borne by the party who reaps their benefit, and this rule may have the effect of forcing the real owner to a speedy assertion and proof of his superior title, since few men would be willing to pay for improvements which they did not themselves direct. The rule in equity, where its aid is invoked by the real owner, is in accordance with the principle of this statute, but is not entirely free from inconvenience in its application. (See *Tomlinson v. Smith*, Finch, 378; *Bright v. Boyd*, 1 Story, 478, 494; 2 Story's Eq. Jur. §799 a, §799 b, §1237 to §1239; *Green v. Biddle*, 8 Wheat. 1; *Patrick v. Marshalls*, 2 Bibb, 45; *Craig v. Martin*, 3 J. J. Marsh. 55; *Morton v. Ridgway*, id. 257; *Barlow v. Bell*, 1 A. K. Marshall, 246; *Grimes v. Shrieve*, 6 Monroe, 557; *Richardson v. McKinson*, Litt. Sel. Ca. 320; *Moore v. Cable*, 1 Johns. Ch. 385; *Green v. Winter*, id. 26; *Putnam v. Ritchie*, 6 Paige, 390. For these authorities I am indebted to Mr. Perkins' note to page 1029 of his recent valuable edition of Sugden on Vendors, which has appeared while these sheets are going through the press.) It was once said at the bar of the Irish Court of Chancery to be "a common equity to improve the right owner out of the possession of his estate."

⁴ *Hopkins v. Lee*, 6 Wheaton, 118. There are many other authorities cited in 2 Greenleaf's Evidence, §269; 4 Kent's Commentaries, 471, and Sedgwick on Damages, 175, as supporting this position; but many of these (as well as some cited in *Davis v. Smith*, 5 Georgia, 274,) are not based upon covenants for quiet enjoyment or of warranty, but upon the covenant for seizin, respecting which there has not been in the United States the least conflict of

ties have already been given, in treating of the measure of damages on a breach of the covenant for seizin, on which, as we have seen, it is conclusively settled in every State in the Union, in which the subject has been discussed, that the damages are to be measured by the value of the land at the time of its alienation, which is established *prima facie* by the consideration named in the conveyance. We may then inquire why, if this rule be so generally and rigidly adhered to as to one of the covenants for title, has a different one been any where established as to another, since all the arguments drawn from the civil law in favor of recompensing an innocent party for improvements made upon the land which he had supposed was his, apply with equal force to both? The only answer to this is a technical one. It is said that damages are to be estimated by the value of the land at the time of the breach of the covenant. The covenant for seizin is broken as soon as it is made—that for quiet enjoyment or of warranty is not broken until eviction; hence, it is said, the difference of the rule. There seems many reasons why this should be an unsatisfactory answer. In the first place, technically speaking, the covenants are no more than an expression of the intention of the parties, and, within certain well defined rules, are to be construed according to this intention. It is very evident that the vendor when making them never dreams of such an enlarged liability by reason of his purchaser's improvements; and, on the other hand, the latter takes the title for

authority as to the measure of damages for many years. Some of the authorities cited in *Davis v. Smith*, are, moreover, cases of executory contracts.

what it is worth at the time; he makes by his contract the purchase money the measure of the value of the title, and takes security by means of covenants in that amount and no more.¹

If then we turn to what some of the decisions call the equitable view of the case, the anomaly seems striking. It is hard, they say, that a purchaser, acting in good faith, should lose the valuable improvements wherewith his honest labor has enriched the land. This is indeed true, but it affords no reason why a vendor, acting also in good faith, should pay for them. Here are three parties, all acting *bona fide*. The vendor, with the honest belief that an estate is his, sells it to a purchaser, who, with the same conviction, improves it, and enhances its value, perhaps ten-fold. The real owner, immediately on discovering his title, sues for and recovers the estate. How shall the profit and loss be adjusted? By taking, say those decisions, from the vendor ten times the consideration money he received, paying it to the purchaser, who will thereby be put in the same position he was before, and letting the real owner retain and reap the benefit of all the improved value of the estate. It is difficult to perceive the equity of this rule, and courts of equity have not followed it. It is a familiar principle in equity, that if the real owner of an estate invoke its aid for the recovery of the estate from one who, acting in good faith, has put improvements upon it, that aid shall be given to him only upon the terms that he will make due compensation to such innocent person, to the extent of the benefits which will be received from those improvements, since the party who

seeks equity must first be willing to do what is equitable.¹

There is another light in which this matter may be viewed. The cases referred to speak always of *improvements* and *increased value* of the property. But after a certain advance of civilization, property does not always increase. In the larger cities, streets that were at one time the most desirable, either for business or pleasure, yield their attractions in those respects to others, and real estate there depreciates in value, while in the country, the tide of emigration is not unfrequently capricious and not to be depended upon. Improvements of the most lasting and permanent character may sometimes be more than counterbalanced by depreciation from other causes; or, what is a much stronger case, the purchaser's own neglect or carelessness may have reduced a flourishing farm to a comparative wilderness.¹ Suppose the purchaser to have received a covenant for seizin, and one for quiet enjoyment. He can sue upon either, or he is allowed, it is said,² if he sue upon both, to have satisfaction upon either. If the property is less valuable than when he purchased it, he elects to enter judgment upon the covenant for seizin, and he receives the consideration money, which is far more than the property is then worth. If, however, it has increased in value, judgment is entered on the covenant for quiet enjoyment, or of warranty.

¹ Story, § 799, 1237, &c.; Sugden Ch. 22, sect. 51, 52, 53, &c. See the remarks in *Davis v. Smith*, 5 Georg. 274.

² By the Louisiana code, however, "When, at the time of eviction, the thing sold has lost any of its value, or is considerably impaired, either through the neglect of the buyer, or by any providential acts, or unforeseen accidents, the seller is still bound to the restitution of the full price." Art. 2483.

³ *Sterling v. Peet*, 14 Conn. 245.

The impossibility of adapting laws to suit any emergency, has been lamented by jurists of every age and country, and it is obvious that the common law rule as to the measure of damages on these covenants will often afford an imperfect remedy. Still it is a certain remedy. The rules of the civil law have been felt to be arbitrary, and in many instances conflicting, and as Mr. Chief Justice Kent has well remarked,¹ “on a subject of such general concern and of such momentary interest as the usual covenants in a conveyance of land, the standard for the computation of damages, (whatever that standard may be,) ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed.”

But the rule of the common law is capable of being modified by circumstances in a court of law, or by a court of equity. If the vendor has made use of fraud or concealment, an action on the case, in the nature of a writ of deceit, may restore to the purchaser the value of all he has lost.² If the purchaser had, with knowledge of the defect, gone on with his improvements, his claim for their allowance will seem to rest upon less strong grounds than if he were ignorant, notwithstanding he has taken the covenants for his protection against the defect. And if the real owner has lain by and seen these improvements go on without asserting his claim to the estate, if it be doubtful whether this can be in a court of law set up as an equitable defence to an action for the mesne profits, it is very certain that it would be recognized in a court of equity.³

¹ *Pitcher v. Livingston*, 4 Johns. 21.

² *Supra*, p. 75, *Lee v. Dean*, 3 Whart. 316.

³ *Green v. Biddle*, 8 Wheat. 77; *Lord Cawdor v. Lewis*, 1 Younge & Coll. Exch. 427; *Bright v. Boyd*, 1 Story's R. 478-493.

But there may be a distinction which although it has been called¹ "a nice and speculative one," has been repeatedly applied to the somewhat analagous principle of damages upon admeasurement of a writ of dower, and this is between a rise in value owing to improvements made by the purchaser, and an increase from other and adventitious circumstances.

By the common law, as stated by Coke,² it seems that the wife was entitled to admeasurement of dower as against the heir according to the value of the land at the time of the dower being assigned to her, whether that value was greater or less than "in the time of the husband," and whether occasioned by improvements or not. But as respects a purchaser the rule was different; and we find in Mr. Hargrave's note that "if feoffee improves by building, yet dower shall be as it was in the seizin of the husband."³

¹ *Pitcher v. Livingston*, 4 Johns. 1.

² Co. Litt. 32 a.

³ Pasch. 17 Hen. III. (cited Fitz. Ab. Dower, 192); Pasch. 31 Ed. I. (cited Fitz. Ab. Voucher, 288); for which this reason is quoted from the Hale MSS. "For the heir is not bound to warrant except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he could recover in value, which is not reasonable." The cases cited from the Year Books appear to sustain this distinction, though not for the reason given by Lord Hale.

The cases are these: Pasch. 17 Hen. III. "E. who was the wife of R., demands one-third part of three acres of land with the appurtenances in E., as her dower, against W. And W. comes and says that he bought the land of her husband naked, and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And, therefore, she had her seizin, saving the said W. the houses built by him," &c.

Pasch. 31 Edw. I. "Dower and demand of the third part of a mill, and the tenant vouches, and the vouchee comes and demands what he had to bind him, and the tenant shows a charter conveying a certain place, upon which the vouchee demands judgment if he ought to warrant; the tenant says, that after the gift he built a mill; judgment if of such he ought to be

But in America a further distinction is taken in many of the States as regards the purchaser; and though in none of them is the wife allowed to receive any advantage by reason of improvements, yet there are many cases which give her the benefit of the increase in value exclusive of improvements, such as would arise from improvements near the property or the general prosperity of that section of country. The leading case in support of this principle may be said to be *Thompson v. Morrow*.¹ Parsons, Ch. J., had, it is true, in a prior case in Massachusetts,² used the following language: "If the husband during coverture had aliened real estate in a commercial town, and at his death the rents are trebled from causes unconnected with any improvement in the estate, and the widow should then sue for her dower, perhaps it might be difficult for the purchaser to maintain that one-ninth only and not one-third should be assigned to her;" but this was introduced for the sake of illustration merely and did not form part of the case. In *Thompson v. Morrow*, the land had received a twofold increase of value, first by reason of the purchaser's improvements, and secondly by the rapid advance of the city of Pittsburgh; and the case was twice elaborately argued. Tilghman, Ch. J., after premising that dower was a claim founded in law, and favored by Courts both of law and equity, referred to the cases cited by Mr. Hargrave from the Year Books, and observed that such

warranted; and the case was, that in the seizin of the husband the place was but a vacant place. Herle; He might have abated the writ. Hingham; You ought to have discovered the matter when you vouched, and it was not done, for which award," &c. See also Perkins, Dower, 328.

¹ 5 Serg. & Rawle, 289.

² *Gore v. Brazier*, 3 Mass. 523.

of them as limit the wife to the value of the land at the time of its alienation, were all cases where the purchaser had made improvements, and then remarked: "I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband, where the question did not arise on improvements made after the alienation. In our own State it does not appear that the point now in question has been decided, though I have certainly considered the general understanding to be, that the widow should have the advantage of all increase of value, not arising from improvements made after the alienation." And after referring to the case of *Gore v. Brazier*, and the New York cases which deny an increase of dower by reason of improvements, the opinion thus concludes: "Having considered all the authorities which bear upon this question, I feel myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is that the widow shall take no advantage of improvements of any kind made by the purchaser, but throwing those out of the question, she shall be endowed according to the value at the time her dower shall be assigned to her." And the distinction thus taken has not only been adhered to in Pennsylvania¹ but has been followed almost wherever it has been noticed.²

¹ In the subsequent cases of *Benner v. Evans*, 3 Penn. R. 456; and *Shirtz v. Shirtz*, 5 Watts, 258.

² In Massachusetts, in the case of *Powell and Wife v. the Monson and Brimfield Manufactory Co.*, 3 Mason, 365, will be found an elaborate opinion of Judge Story, fully adopting the principle of *Thompson v. Morrow*, which has also been sustained in the States of Maine, Delaware, Indiana, Kentucky, and Ohio. *Misher v. Misher*, 3 Shep. 372; *Greer v. Tennent*, 2 Harr. 336; *Smith and Wife v. Addleman and others*, 5 Blackf. 406; *Taylor v. Broderick*, 1 Dana, 348; *Dunseth v. the Bank of the United States*, 6 Ohio, 76.

In considering the reason of the distinction thus taken between an increased value arising from im-

In New York, the cases of *Dorchester v. Coventry*, 11 Johns. 510, and *Shaw v. White*, 13 id. 179, were decided before *Thompson v. Morrow*; and Chancellor Kent, though leaving the point undecided in *Hale v. James*, 6 Johns. Ch. R. 258, says in his Commentaries, (4 Com. 68,) that "the better and more reasonable American doctrine upon this subject, I apprehend to be, that the improved value of the land from which the widow is to be excluded in the assignment of dower, as against a purchaser of her husband, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes."

This language, however, was not fully concurred with in New York, in *Walker v. Schuyler*, 10 Wendell, 485, Savage Ch. J., saying, "Whether the Chancellor is correct or not in this conclusion I am not to inquire. It is sufficient for my purpose that in this State the widow's rights have been frequently adjudicated under a statute like the present statute (which had formerly been held in *Humphrey v. Finney*, 2 Johns. 484, not to establish a new rule different from the common law,) and we are not at liberty to depart from the construction which has been given to it." This construction, it should be observed, was given, as I have above stated, before the case of *Thompson v. Morrow* was decided.

In Virginia, though the point was strongly pressed in the argument of *Tod v. Baylor*, 4 Leigh, 509, the Court were unanimously of opinion that "this doctrine seems to rest on ground similar to that of the recovery of land against the vendor on eviction, which on great consideration we have fixed at the purchase money with interest, in *Stout v. Jackson*, and *Threlkeld v. Fitzhugh*." See *supra*, p. 267-8.

Mr. Sedgwick, in his learned work on the subject of the "Measure of Damages," says, (p. 132,) that as to the point of admeasurement of dower, "some perplexity exists," and "the greatest authorities of American law, Chancellor Kent and Judge Story, are divided," since, he remarks, "the latter holds that the widow shall have the benefit of improvements made by the heir, but not those made by a purchaser;" while "on the other hand" the former declares it to be the ancient and settled rule of the common law that the widow takes her dower according to the value of the land at the time of its alienation, and not according to its subsequent or improved value, though he assented to the right of the dowress to be allowed for increased value arising from extrinsic or general causes." On examination, however, it may be doubted whether there is any conflict of authority as to the rule itself. Each cites the opinion of the other with approbation, and the only difference of opinion seems to be as to its source. Judge Story, in *Powell v. the Manufacturing Co.*, after reviewing and approving the cases which deny to the widow the value of improvements made by a purchaser, comes to the case of *Hale v. James*, decided by Chancellor Kent, and says, "That learned Judge went there again elaborately into the doctrine

provements and one owing to extrinsic circumstances and its application to the subject of damages on the covenant for title, we find that *Thompson v. Morrow*, which is the leading case, gives no other reason than because dower is favored both by courts of law and equity, "it would be hard indeed upon the widow if she was precluded from taking her share of the gradually increasing prosperity of the country;" and the learned Chief Justice finding the cases in the Year Books all to turn upon improvements, "accordingly feels himself at liberty to decide according to what appears to him the reason and the justice of the case." But although we may approve the feeling which led to a new distinction in the law in favor of such a particular class, it may be remarked, that, in strictness of law, what is hardship to a widow is hardship to a purchaser; and there seems no reason why an evicted purchaser should not equally recover the value to which the generally increasing prosperity

and adhered to the rule already laid down, viz., the value of the land at the time of the alienation, acting upon it as a clear rule of the common law." And it is here (as to the source of the rule and not its correctness) that the difference of opinion exists. "With the most profound respect for so great a judge, I must be permitted to doubt if there be any such doctrine in the common law," continues Judge Story, who then remarks that the quotation from Perkins and the Hale MSS. were both susceptible of misinterpretation. In defence of himself, Chancellor Kent, in a note to the 4th Com. p. 68, says, "I am rather of the opinion that they (the authorities) do warrant the doctrine to the extent the Chancellor meant to go, viz.: that the widow was not to be benefitted by improvements made by the alienee. That position does not seem to be denied," &c. There is then no conflict of authority as to the rule, its reason, or its application, but merely as to its source; one learned judge being of opinion that it is derived from the common law, and the other that the common law authorities do not recognize it. From the quotation from the Year Books just cited, it would appear that they certainly are in harmony with our own cases denying to the widow any increase in case of an alienation, and we have the authority of Coke for saying, that in case of a descent the rule was otherwise. Co. Litt. 32 a.

of the country has raised the estate he has lost. It might be urged, that although the rule is a just one which refuses to burden the warrantor with the value of improvements, as they are the purchaser's own act, yet that as respects increased value from other causes, the principles that prevail in other cases of contract should, if possible, be applied, and as in most instances the value of real estate consists in its individuality, a purchaser should, as nearly as possible, be placed in such a position as to enable him to go into the market and supply his loss. There would be, however, one practical difficulty in the way of allowing for increased value which would occur in many cases, viz., that if improvements are to be excluded from the measure of damages, while increase of value from other causes is to be included, it would be often difficult to distinguish between these, since improvements on one place are frequently the cause of improvements on others in the neighborhood, and it would be difficult to say, after the lapse of years, whether the rise in value was caused by the improvements in the vicinity or by those on the estate itself; and Judge Story, even while recognizing the distinction in the case of the widow's dower, admits that "for practical purposes it is impossible to make any distinction between the value of the improvements; between improvements which operate on a portion of the land and those which operate on the whole."¹

It must also be distinctly observed, that although the cases upon covenants for title do not seem to refer particularly to this distinction, yet their decision has almost necessarily denied its application to that subject.

¹ *Powell v. Manufacturing Co.*, 3 Mason, 375.

But the same remark that was made as to the measure of damages in two former chapters, will apply here, viz., that when the cases speak of the measure of damages being the consideration money or the value at the time of eviction, they mean that this is the extent to which damages can be recovered upon the covenants of quiet enjoyment or of warranty, under any circumstances. Within this limit there are various rules. Those which apply to the covenants for seizin and against incumbrances have been mentioned, and with little exception apply also to these covenants. Thus, in a constructive eviction caused by the purchase of the paramount title, the damages will be, as in the case of a covenant against incumbrances, measured by the amount thus paid, together, in some cases, with costs, &c. So where the plaintiff, although he may have been actually evicted, yet may regain the possession by the payment of a certain sum, that amount and no more is allowed him.¹ So where an intermediate covenantee has had a recovery of damages against him, he is limited in his action against the party liable to him, on his covenants, to the amount thus recovered,² and it naturally follows that if the deed from the intermediate covenantee contains no covenants, he cannot, after such assignment by him, recover from a prior covenantor, since in no event can he be under any liability to his assignee.³

¹ Donahoe v. Emory and another, 9 Metcalf, 68; and see cases cited, *supra* p. 138.

² Williams v. Brennan, 2 Dev. 483; Markland v. Crump, 1 Dev. & Bat. 94.

³ Keith v. Day, 15 Vermont, 660, 671.

CHAPTER VIII.

THE EXTENT TO WHICH COVENANTS FOR TITLE RUN WITH
THE LAND.

It has been somewhat generally said in this country that covenants for title are divided into two distinct and separate classes, those which run with the land and those which do not possess this capacity; that, in the former class, are comprised the covenants for quiet enjoyment, of warranty, and for further assurance; in the latter, the covenants for seizin, for right to convey, and against incumbrances.¹

The common law doctrine of covenants running with land being itself an exception to another common law rule, is attended with many niceties of distinction which it would be needless here to dwell upon. I will only attempt, therefore, to notice such of its principles as are applicable to the subject of covenants for title.²

¹ This is not exactly the form in which the proposition should be stated. All the covenants for title run with the land until breach; the difference taken by American authority between them is, that the covenants for seizin, for right to convey, and, it would seem, against incumbrances, are broken as soon as made, while those for quiet enjoyment and of warranty are prospective, and no breach occurs till an eviction, actual or constructive. That for further assurance holds, as will be seen, somewhat of a middle position.

² It is impossible to examine the subject of covenants running with land without experiencing the benefit to be derived from the very able note to Spencer's case, in the American edition of Smith's Leading Cases. Much advantage may also be had from the remarks in the third Real Property Report of the British Commissioners in 1832, which are somewhat freely commented on, in the tenth and eleventh editions of Sugden on Vendors, vol. 2, chap. xiv.

Unless where covenants are to be performed on or about land to which they relate, they form no exception to the old common law rule which prohibited the assignment of choses in action, "lest there should be maintainance and stirring up of suits." But it was not in every case where the covenant was to be performed on or about land that its burden or benefit passed to an assignee; but its capacity in this respect depended upon the tenure between the covenantor and covenantee, the nature of the estate, the nature of the covenant, and the relation of the latter to the former.

Where the tenure between the covenantor and covenantee was such as to create a privity of estate between them, as was very anciently the case upon every conveyance, both the benefit and the burden of covenants which might be entered into by either, passed to his assignee, not by direct operation of assignment, but as an incident to the land to which the covenant was annexed.

When the statute of *quia emptores* abolished subinfeudation, privity of tenure and estate no longer existed upon conveyances which passed the fee and left no reversion in the donor, and it became a rule that covenants which imposed any charge, burden or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee; thus, if the owner of land granted it in fee, reserving to himself a rent which the grantee covenanted to pay, here, though the covenant was to be performed out of the land, yet the assignee of the covenantor would hold the land discharged from its liability.¹ But on the other hand, if the covenant

¹ Thus the liability of an assignee to pay ground rent can only be en-

were one intended to benefit the land, it was held to be incident to it even if made by a stranger,² and therefore whoever might become the owner of the land, would also become entitled to the benefit of the covenant. This is illustrated by the early authority of Pakenham's case,³ where a Prior and Convent covenanted with the owner of a manor, on which stood a chapel, that they would sing weekly in this chapel for the benefit of the owner and his servants, the assignee of the manor was held entitled to the benefit of the covenant. In this case the covenantors were strangers to the land, there was no privity of estate between them and its owner, yet as the covenant was one supposed to benefit the land, it passed to whomsoever might be the owner, although as between him and them there was neither privity of estate nor contract. It is upon this principle, that both the ancient warranty and the more modern covenants for title, intended for the benefit of the land, were held

forced on strict principles, where there is some privity between the covenantee and the assignee of the covenantor. See *Milnes v. Branch*, 5 Maule & Selwyn, 411. Until the statute of *quia emptores* abolished subinfeudation, such a privity grew at common law out of every conveyance into which no contrary stipulation was introduced. In Pennsylvania, before it was decisively announced from the bench, in the case of *Ingersoll v. Sergeant*, 1 Whart. 337, that this statute never was in force in that State, the rights of the ground landlord against the assignee of his grantee could only have been supported upon the common law of that State, though attempts had, before that decision, been made to found them on authority. *Streaper v. Fisher*, 1 Rawle, 155; *Scott v. Lunt's Admrs.* 7 Peters, 605.

² Such at least is the conclusion of the English Real Property Commissioners, 3d Rep. p. 52; and such appears to be the view taken by Mr. Hare. Sir E. Sugden, however, questions the accuracy of this conclusion, and seems to think that Pakenham's case has been misunderstood. 2 Vend. 472, &c. See Mr. Hare's note to *Spencer's case*, 1 Smith's Leading Cases, Am. Ed. p. 108, and the comments on the cases of *Brewster v. Kitchell*, 1 Raym. 317; *Taylor v. Owen*, 2 Blackford, 301.

³ 42 Edward III. cited in *Spencer's case*, 3 Coke, 16.

to run with it to the assignee; that is to say, the owner of the land for the time being was entitled to the benefit of all the warranties and covenants which the prior owners in the chain of title might have given. There was, however, this important difference between warranty and the covenants which superseded it. The former was, in the strict sense of the word, a covenant real, and its benefit descended upon the heir in every instance, whether it had or had not been broken in the life time of the ancestor. It was a right to which an executor could never succeed.¹ But with respect to covenants, although until breach, they equally, with the warranty, passed to the heir with the land they were intended to protect, yet if a breach had occurred in the life time of the testator, they then became choses in action, incapable of transmission or descent, and whose right survived to the executor alone.²

Nor is there any difference as to principle between English and American authority in this respect. It is a settled rule on both sides of the Atlantic, that until breach, the covenants for title, without distinction between them, run with the land to heirs and assignees. But, while this is well settled, a strong

¹ Touchstone, 175.

² Cov. Dig. Covenant B. 1 Office of Ext. 160; *Lucy v. Levington*, 2 Lev. 26; *Morley v. Polkill*, 2 Vent. 56 S. C.; 3 Salk. 109, pl. 10; *Smith v. Symonds*, Comberb. 64; *Raymond v. Fitch*, 2 Compt. Mees. & Rosc. 588; S. C. 4 Tyrwh. 985; *Ricketts v. Weaver*, 12 Mces. & Welsb. 718; *Young v. Raincock*, 7 Com. Bench, 310. The much controverted cases of *Kingdon v. Nottle*, 1 Maule & Selwyn, 365; 4 id. 53; and *King v. Jones*, 5 Taunt. 418; *Jones v. King*, 4 M. & S. 188, though sound as to the decision, contain some dicta which would seem to justify the conclusion that modern covenants for title, like the warranty, passed to the heir or devisee whether the breach did or did not happen in the testator's life time. This was going too far, and has since been corrected by the cases of *Raymond v. Fitch*, *Ricketts v. Weaver*, and *Young v. Raincock*.

current of American authority has set in favor of the position that the covenants for seizin, for right to convey, and perhaps, against incumbrances, are what are called covenants *in presenti*—if broken at all, their breach occurs at the moment of their creation. The party covenants that a particular state of things exists at that time, and if this be not true, the delivery of the deed which contains such a covenant causes an instantaneous breach; these covenants are then, it is held, turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an heir, a devisee nor a subsequent purchaser.

A distinction, therefore, exists, in this respect, between the covenants just named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character.

On the other hand, it is held in England that no such distinction exists between the different covenants. That for seizin, it is said, is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but it is rather in the nature of a covenant to do a thing *toties quoties*, as the exigencies of the case may require, and that the want of seizin is therefore a continuing breach—that even although, according to the letter, there should be a breach on the instant of the creation of the covenant, (when its words are in the present tense,) yet that according to its spirit, the right of action should pass to and vest in the party in whose time the substantial breach occurs and who ultimately sustains damage; the covenant not being inserted merely for the benefit of the covenantee, but

for the protection of all who derive their title to the land through him.

Such are the principal grounds on which the English decisions have been based.¹ In the case of *Kingdon v. Nottle*, when first presented,² the plaintiff *as executrix* sued the defendant for a breach of the covenant for seizin, and, as is usual in declarations on this covenant, assigned for breach that the defendant was not seized, &c., which on special demurrer was held bad, on the ground that there was no other damage than such as arose from a breach of the defendant's covenants that he had a good title—that that breach was not shown to have been a damage to the testator—that it was not alleged that the estate was thereby prejudiced during the lifetime of the testator, and if after his decease any damage occurred, that would be a matter which concerned the heir.

Judgment was therefore entered in that action for the defendant. But when the case was again presented,³ the same plaintiff sued *as devisee* of the covenantee, setting forth in the declaration that the estate had been prejudiced by reason of the defect of title, and its sale prevented. On demurrer, it was argued for the defendant, that the covenant was broken as soon as made, and therefore no right of action passed to the devisee, but it was held that so long as the defendant had not a good title, there was a continuing breach; and although according to the letter, there was a breach in the testator's lifetime, yet that, according to the spirit, the substantial breach was in the time of the devisee, for she thereby lost the fruit

¹ *Kingdon v. Nottle*, 1 Maule & Selw. 355; *King v. Jones*, 5 Taunton, 418; *Kingdon v. Nottle*, 4 Maule & Selw. 53; *Jones v. King*, id. 118.

² 1 Maule & Selw. 355.

³ *Kingdon v. Nottle*, 4 Maule & Selw. 53.

of the covenant in not being able to dispose of the estate.

The case of *King v. Jones*¹ proceeded much on the same ground, though the covenant was for further assurance, which, though its breach occurs technically by the refusal, upon request, to execute a further assurance, may present the same question as that arising on the covenant for seizin. In that case, the refusal to make further assurance occurred during the lifetime of the covenantee, while the real damage was felt by his heir, who was the party evicted. "The covenantee," said Heath, J., "paid his purchase money, relying on the vendor's covenant: he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir, (who represents the ancestor in respect of land, as the executor does in respect of personalty,) in preference to the executor." And this judgment was affirmed on writ of error to the King's Bench.²

¹ 5 Taunton, 418.

² *Jones v. King*, 4 Maule & Selw. 188. In considering these cases, care must be taken to distinguish between their actual decision and the dicta which they contain. The cases themselves decide no more than that in the first place, until breach, the covenants for title run with the land; and that, secondly, the covenant for seizin, though nominally broken at the instant of its creation, has in reality a continuing breach, not consummated until some actual damage has taken place. In other words, it is not so much a covenant *in presenti*, as a covenant of indemnity. The American authorities agree with the first of these propositions, but, in general, dissent from the second.

There is at present but a single State¹ in which the principle decided by these cases has been fully adopted, although there are some in which no opposite opinion has been expressed.

The Supreme Court of Ohio, though professing not to go quite to the extent of the modern English cases, yet has not in reality stopped far short of them. *Backus' Administrators v. M'Coy*,² is the leading case, and although the pleadings did not perhaps strictly call for the doctrine there laid down, yet it has since been adhered to and become the law of that State. After referring to the decision of *Kingdon v. Nottle, &c.*, Sherman, J., in delivering the opinion of the Court, held that they settled that "when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty, and where he has been evicted by paramount title, he is the party damnified by the non-performance of the grantor's covenants, and, for such breach, may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seizin as a real covenant, attendant upon the inheritance, it will form a part of every grantee's security, and make that, which otherwise must be either a dead letter, or a means of injustice, a most useful and beneficial covenant. A dead letter, when an intermediate conveyance has taken place, between the making of the covenant and the discovery of the defect of title, and the covenantee refuses to bring suit. A means of injustice, when, after the cove-

¹ Indiana. See *Martin v. Baker*, 5 Blackf. 232.

² 3 Ohio, 216.

nantee has sold and conveyed without covenants, he brings and sustains an action, on the ground that the covenant was broken the moment it was entered into, and could not, thereafter, be assigned. When lands are granted in fee, by such a conveyance as will pass a fee, and the grantor covenants that he is seized in fee, we can perceive no objection, legal or equitable, to this covenant, as well as the covenant of warranty, passing with the land, so long as the purchaser, and the successive grantees under him, remain in the undisturbed possession and enjoyment of the land."¹

The doctrine thus held, though strenuously assailed in the argument of a subsequent case,² was nevertheless there adopted by the Court, and it may be said to be the settled law of the State of Ohio.³

But the weight of American authority is undoubtedly in favor of the position, that the covenant for seizin being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, incapable of assignment, and consequently of being exercised by any but the covenantor or his personal representatives.⁴

¹ See *supra*, p. 39, note.

² *Foote v. Burnet*, 10 Ohio, 327.

³ *Devore v. Sunderland*, 17 Ohio, 60.

⁴ *Hacker v. Storer*, 8 Greenl. 228; *Heath v. Whidden*, 24 Maine, 383; *Williams v. Wetherbee*, 1 Aiken, 233; *Garfield v. Williams*, 2 Verm. 327; *Richardson v. Dorr*, 5 Verm. 9; *Potter v. Taylor*, 6 id. 676; *Peirce v. Johnson*, 4 id. 253; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 id. 249; *Bickford v. Page*, 2 Mass. 455; *Prescott v. Truman*, 4 id. 627; *Wheelock v. Thayer*, 16 Pick. 68; *Thayer v. Clemence*, 22 id. 490; *Clark v. Swift*, 3 Met. 390; *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; *Townsend v. Morris*, 6 Cowen, 123; *Beddoe's Exr. v. Wadsworth*, 21 Wend. 120; *McCarty v. Leggett*, Hill, 134; *Lot v. Thomas*, 1 Pennington, 407; *Chapman v. Holmes*, 5 Halst. 20; *Garrison v. Sandford*, 7 id. 261; *Wilson v. Forbes*, 2 Dev. 30; *Grist v. Hodges*, 3 id. 200; *South's heirs v. Hoy's heirs*, 3 Monroe, 94; *Rice v. Spottiswood*, 6 id. 40; *Logan v. Moulder*, 1 Pike, 313; *Ross v. Turner*, 2 English, 132.

But the American rule has not been applied to the covenant against incumbrances, without a struggle.

In *Mitchell v. Warner*, especially, was the English doctrine severely criticised. From the opinion of Lord Ellenborough in *Kingdon v. Nottle*, said Hosmer, Ch. J., "I am compelled to dissent *in omnibus*. First, I affirm, that the novel idea attending the breach in the testator's lifetime, by calling it a (continuing breach,) and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, *to whom* does it continue as a breach? The only answer is, *to the person who had title to the contract when it was broken*. It remains, as it was, a breach to the same person who first had a cause of action upon it. If it be any thing more, it is not a continuing breach, but a new existence. In the next place, I assert, that it is like a covenant to do an act of solitary performance: and for this plain reason, that it is, in its nature, a covenant for a solitary act, and not a successive one. If the covenant is broken, that is, if the grantor was not seized, it is infracted to the core. and a second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a *future* act, at different times, which may undergo repeated breaches. It has no futurity, and cannot be partly broken and partly sound; but the grantor is seized, or not seized, and, therefore, the covenant is inviolate, or violated wholly. Not further to pursue the subject, I remark, that, in my judgment, the case of *Kingdon v. Nottle* may justly be said to authorize the assignment of a chose in action by devise; a supposition as unfounded as it is novel. I, therefore, conclude, that the determinations in the above mentioned cases of *Kingdon v. Nottle*, are against the ancient, uniform and established law of Westminster Hall; against well settled principles and decided cases in the surrounding States; and that the judges pronouncing them would have been of an opinion different from the one expressed, had they recognized the principle here well established, that the breach of the covenant of seizin is, in its nature, *total*, and the measure of damages the whole consideration money paid for the land."

In Maine, however, the rule which denies the benefit of a covenant for seizin or against incumbrances to an assignee, has been altered by the Revised Statutes, the provisions of which are thus referred to in the very recent case of *Prescott v. Hobbs*, 30 Maine, 346. "The 16th sect. of chap. 115, R. S., indicates," said Wells, J., "that a right of action shall pass to the assignee of the grantee, for a breach of the covenant of seizin; but the language necessary to perfect such an intention, is not used throughout the whole section. It subsequently limits the enactment to cases of incumbrances, arising from mortgages. But sect. 17 dispels the obscurity of the prior one. It takes from the grantee, after he has assigned to a third person, the power to release the covenants of seizin and freedom from incumbrances, 'so as to bar or any way affect the right of such third

The original object of the introduction of this covenant—it being often connected with the covenant for quiet enjoyment, and thereby rendered equally prospective with it—it being often called a covenant of indemnity, and the obvious policy of insuring its benefit to the owner for the time being, all have conspired to militate against the stern rule which has confined the covenant for seizin within such a narrow sphere of usefulness. We find that in some earlier cases in Massachusetts,¹ the assignee of one who had received a covenant against incumbrances was, without objection or comment, allowed to recover, and in a subsequent case,² the language of the Court to this effect was direct and explicit.

person, to maintain an action against the first grantor, for breach of said covenants of seizin, and freedom of the premises from incumbrances.'

"This section deprives the grantee, after the assignment, of the power of releasing such covenants, and recognizes the right of the assignee to maintain an action to recover damages for the breach of them.

"Taking both sections together, the meaning and purpose of the Legislature is too plain to be disregarded. It is manifest that a right of action for a breach of the covenant of seizin, as well as that against incumbrances, is intended to be given to the assignee of the grantee.

"Both the act of March 23, 1835, and the 16th sect. of chap. 115, R. S. require, that the plaintiff shall file in Court at the first Term, for the use of his grantor, a release of the covenants in his grantor's deed, and all causes of action on any such covenants."

¹ *Stinson v. Summer*, 9 Mass. 143, and *Eastabrook v. Hapgood*, 10 id. 313; • cases decided in the very State where the technical rule has been so rigidly adhered to.

² *Sprague v. Baker*, 17 Mass. 588. "The objection is," said Wilde, J., who delivered the opinion, "not that the covenant had been kept, but that it was broken previous to the assignment to the plaintiff; and being a chose in action, it was not assignable by the common law. The ground of this objection has been frequently held valid by this Court: 2 Mass. Rep. 455, *Bickford v. Page*; *Wyman v. Ballard*, 12 Mass. Rep. 304. The same point was determined in the case of *Lewis v. Ridge*, Cro. Eliz. 863; and by a majority of the Court, in the case of *Greenby et al. v. Wilcocks*, 2 Johns. 1. A similar doctrine is laid down by Comyns Dig. Covenant, B. 3. It, however, depends upon a rule of the common law, for the avoidance of maintenance, the good sense of which Judge Buller, in the case of *Master v.*

So in South Carolina,¹ it has been held that the benefit of this covenant passes with the land to its assignee.

Millar, 4 D. & E. 340, thought very questionable. He even pronounces it not only a quaint maxim, but a bad one; which, he says, the Courts of Equity, from the earliest times, thought too absurd for them to adopt. However this may be, it is a rule of the common law, and must be held binding. But we are not disposed to apply it to cases not coming within the reason of the rule; and we are inclined to the opinion, that the present is a case of that description.

There was a breach of the covenant, it is true, before the assignment; but for this breach, Hitchings could only have recovered nominal damages. The actual damages accrued after the assignment. These were sustained by the plaintiff, and not by Hitchings; who has no interest in them, except what arises from his covenants with the plaintiff. But suppose there had been no such covenants, or suppose Hitchings to be insolvent; then, unless the plaintiff can maintain the present action, he is without remedy. This certainly would not be right; nor do I think that such is the law. It seems to me that, if the present case required a decision upon this point, we might be well warranted in saying that the covenant against incumbrances, notwithstanding the breach, passed to the assignee, so as to entitle him to an action for any damages he might sustain after the assignment, because the breach continued, and the ground of damages has been materially enlarged since that time; so that plaintiff's title does not depend upon the assignment of a mere chose in action. He is principally interested in the covenant, and those covenants run with the land, in which the owner is solely or principally interested, and which are necessary for the maintenance of his rights. Covenant lies by an assignee, on every covenant which concerns the land. Com. Dig. Covenant, B. 3; Mo. 242."

¹ McCrady v. Brisbane, 1 Nott. & McCord, 104.

The authorities however, cited in support of this, were not applicable to this covenant, since they were cases arising under covenants for further assurance, eminently prospective in their operation, and indeed the distinction between their several natures seems not to have been very closely observed. The following authority from Co. Litt. 384, b.; would appear to have been principally relied upon.

"It hath been adjudged, (42 Ed. III. b.) that where two coparceners made partition of land, and the one made a covenant with the other, to acquit his and her heirs of a suit that issued out of the land, the covenantee aliened. In that case, the assignee shall have an action of covenant; and yet he was a stranger to the covenant, because the acquittal did run with the land." "This seems," says Cheves, J., "almost precisely the case before us, and authorizes me to say, that where the covenant runs with the land, the assignee of the fee may have the benefit of the covenant against incumbrances in a

On the other hand, at a later period in Massachusetts,¹ the technical rule was adhered to in so few words, as to induce the impression that it had never been doubted, and although in one case,² the question seems to have been thought an open one, yet when the point was directly presented within a few years past,³ the authority of the earlier cases which proceeded upon the English doctrine was distinctly repudiated, and the question may be considered as finally settled in favor of the technical rule, not only in Massachusetts, but probably in most of the other States, with the exception of Indiana, Ohio, and Maine.

According therefore, to the weight of American authority, the benefit of the covenant against incumbrances is denied to an assignee, unless where it is either so expressed in itself, or so linked to another covenant as to have a prospective operation, and not be a covenant *in presenti*.

Mr. Chancellor Kent, in referring in his Commentaries⁵ to the principle as settled by the American cases, has remarked that "it is to be regretted that the technical scruple that a chose in action was not assignable, does necessarily prevent the assignee from availing himself of any or all of the covenants. He is the most interested, and the most fit person to

case like the present." This is of course obvious, provided it be not held that the covenant is broken once and for all at the instant of its creation. In the quotation from the Year Book, the covenant was a prospective one, and the decision would, it is believed, have been the same at the present day in any Court.

¹ Tufts v. Adams, 8 Pick. 49.

² Pettee v. Hawes, 13 Pick. 327.

³ Thayer v. Clemence, 22 Pick. 494; Clark v. Swift, 3 Metcalf, 394.

⁴ 4 Com. 472.

claim the indemnity secured by them, for the compensation belongs to him, as the last purchaser, and the first sufferer." Lord Ellenborough got over the difficulty in *Kingdon v. Nottle*, when the case came before him the second time, by holding that the want of seizin was a continuing breach; "but this," said Mr. Chancellor Kent, "is too refined to be sound. The breach is single, entire, and perfect in the first instance."

Nominally indeed this is so, yet in many instances it may be, that the breach is but nominal for a long time, undiscovered perhaps, and in point of fact injuring no one; and the want of title may be at length, for the first time, felt by one who, removed from the original grantee by many conveyances, has directly to bear the whole burden of the loss. In such case, if the injured party has not received a general covenant from his immediate grantor, he may be, according to the current of American decision, without remedy, for a covenant limited to the acts of the grantor, would not, of course, be broken by any want of seizin in those prior to himself in the chain of title. In parts of this country where, as in England, a vendor does not in general covenant beyond his own acts, it becomes important that each vendee should have the benefit of all the covenants entered into by the prior owners, so that although each vendor may only have covenanted against his own acts, yet in the last vendee will be vested the right to take advantage of each and all of these covenants; and this can only be, on the principle that their technical and their actual breach occur at the same time.

Nor does the American rule appear to be supported by the older authorities which have been cited to sustain it. The case of *Lucy v. Levington*,¹ which is constantly relied on by the American cases, decides no more than that where a testator who had received a covenant for quiet enjoyment, was evicted, his executor was the proper party to take advantage of the covenant, the whole and ultimate damage having accrued to the testator by the eviction in his lifetime. But the case of *Lewis v. Ridge*² is the authority which, in this country, is deemed to be conclusive of the point, that a covenant for seizin or against incumbrances is broken as soon as made, and is immediately incapable of assignment. The decision seems to have been somewhat misunderstood. "The case was such; the defendant, being seized of land in fee, let it for life, remainder for life, rendering rent, and afterwards acknowledged a statute, and after that, by indenture bargained, and sold the reversion, and covenanted with the bargainee, his heirs and assigns, that it should be discharged, within two years, of all statutes, charges, and incumbrances, excepting the estates for life. The statute is extended, and thereupon this reversion and rent was extended. The bargainee grants this reversion to the plaintiff, who, for not discharging of this statute, brings covenant. And, all this matter being disclosed to the Court, it was thereupon demurred. The question principally moved was, whether the plaintiff, as assignee; shall have benefit of this covenant made to the bargainee by the common law, or by the statute of 32 Hen. VIII.? But because the

¹ 2 Lev. 26; S. C., 1 Ventr. 175.

² Cro. Eliz. 863.

covenant was broken before the plaintiff's purchase, the land being then in extent, and so a thing in action, which could not be transferred over, it was adjudged for the defendant, that the action was not maintainable against him."

There are two points of view from which the authority of this case will be found in no degree opposed to that of the more recent English decisions. In the first place, there can be no doubt that a covenant to discharge of incumbrances within two years is finally and actually broken at the expiration of that time, although no special damage whatever may have occurred to the covenantee,¹ and such a covenant differs, in this respect, from the usual covenant against incumbrances, on which, although broken as soon as made,

¹ *Lethbridge v. Mytton*, 2 Barn. & Adol. 772; *Trustees of Newburg v. Galatian*, 4 Cowen, 343; *Booth v. Starr*, 1 Cowen, 249. "There is a difference," said Swift, J., in an able opinion in this case, "between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge and acquit the plaintiff from any damage by reason of such land or particular thing, then it is a condition to indemnify, and save harmless. 1 Saund. 117, n." *Lethbridge v. Mytton* was a very strong case in point. In an action by the trustees of the defendant's wife, on a covenant to pay off certain incumbrances to the amount of £19,000, no special damage was laid or proved, and judgment having gone by default, the sheriff's jury gave nominal damages; but this was set aside by the Court of King's Bench, Tenterden, Ch. J., saying, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value;" and Patterson, J., adding, "the trustees were entitled to have this estate unincumbered. How could that be enforced unless they could recover the whole amount of the incumbrance, in an action on the covenant?" It is proper, however, to observe, that the authority of this case is denied by Mr. Sedgwick in his treatise on the Measure of Damages, (p 190). I have, however, ventured to suggest, *supra*, 142, note 2, that the decision appears to be perfectly sound.

no more than nominal damages can, as a general rule, be recovered by reason of such a mere technical breach.¹ But in addition to this, it seems not to have been observed, that in this case of *Lewis v. Ridge*, execution had issued upon the statute; the land was actually in extent; the covenant was therefore as completely broken as it could be,² “the land being then in extent, *and so*, (that is the covenant), a chose in action,” and, if we substitute the assignment by the covenantor in the one case for the death of the covenantor, in the other, the case of *Lewis v. Ridge* seems to become exactly that of *Lucy v. Levington*, both perfectly consistent with each other, and both deciding no more than that after total breach the covenant becomes a chose in action, and therefore incapable of transmission or descent.

It may not be improper to observe, that in deciding such questions upon covenants for title, some regard should be had to the original purpose of their introduction, the intention of the parties making and receiving them, and the object which they are intended to fulfill. They succeeded the ancient warranty, which was exclusively a covenant real, and

¹ *Supra*, p. 129.

² In this case, the word *extent* seems to be used in its general sense as synonymous with execution upon a statute or recognizance. This was often the case in the older books, for although upon a statute staple the conuzee could not, after the appraisement or extent of the lands, immediately take possession of them, but was obliged to sue out a *liberate*, (F. N. B. 132), in which case the extent was not the consummation of the execution, but only one of its parts, yet upon a statute merchant, if the sheriff returned to the *capias* that the party was dead or not in his bailiwick, the lands were extended and forthwith delivered to the conuzee, without the delay or expense of a *liberate*. F. N. B. 130. Instances of the word *extent* being thus used, will be found in Bac. Ab. Execution B. See the Stat. de Merc. 13 Ed. I., St. 3, c. i.

could never in any event be taken advantage of by personal representatives, and it seems that the introduction of the covenants in place of the warranty was intended rather to extend the remedy, both by means of the more pliable form of the action of covenant, and by giving indemnity in the shape of damages, than to alter materially the rights and relative positions of those who might seek to take advantage of them. It was probably not supposed at the period of its introduction, that the covenant for seizin could never be taken advantage of by any one to whom the land had come by assignment or by inheritance, and that the remedy upon it was restrained to the covenantee himself, or to his executor, if the actual damage happened in his lifetime. Such a rule, if practically enforced, might have materially lessened the value of this covenant.¹

But, it may be asked, are there no means by which the rigor of the American rule can be mitigated? Are the covenants for seizin and against incumbrances to be a dead letter, except to the party with whom they were originally made? The answer to this question is, in one respect, satisfactory, and in another it is not. It is familiar, that although by the common law choses in action were not capable of assignment, yet that such assignments were, from an early day,

¹ Nor, perhaps, can an authority be found in the English books to support such a doctrine. The case of *Lewis v. Ridge*, it has already been observed, seems to have been misunderstood. The decisions in *Kingdon v. Nottle*, and *King v. Jones*, appear to have laid down no new law; and in 3 *Wentworth's Pleading*, 440, will be found an elaborate declaration, drawn by Mr. Lawes, (author of the well known work on *Pleadings in Assumpsit*), in an action brought by the assignee of one who had received covenants that a lease was a valid and subsisting one, and that the covenantor had full power to assign it.

recognized and enforced by courts of equity;¹ and, in modern times, the common law courts have, to a great extent, acted upon the same principle,² and although they still hold it necessary that the original party should appear upon the record as the plaintiff, yet they permit his name to be used by the party actually damnified, and protect the latter from any fraud upon his rights committed by the former.³ Thus, a release from the party originally entitled to the benefit of a contract to the party originally bound by it, would not, at the present day, either in a court of law or equity, be suffered to defeat the rights of an assignee of the former, in an action brought by him against the latter.⁴

These principles may perhaps serve to obviate the inconveniences occasioned by the American rule, that the covenants for seizin and against incumbrances are incapable of being taken advantage of by an assignee. The name of the original covenantor might perhaps appear as plaintiff on the record, and the injury to the party actually damnified be regarded as forming the measure of damages.⁵ It frequently,

¹ See, *passim*, Story's Eq. Juris. § 1647, &c.; 2 Spencer's Eq. Jur. 850, &c.

² *Master v. Miller*, 4 Term R. 340; *Welch v. Mandeville*, 1 Wheat. 235; see cases cited in the note, S. C. 5 Wheat. 277; *Wheeler v. Wheeler*, 9 Cowen, 34.

³ *Leigh v. Leigh*, 1 Bos. & Pul. 447; *Manning v. Cox*, 7 Moore, 617; *Riddell v. Riddell*, 7 Simon, 529; *Crooke v. Jewell*, 29 Maine, 530; *Blin v. Pierce*, 20 Vermont, 25; *Johnson v. Irby*, 8 Humph. 654; *Grover v. Grover*, 24 Pick. 261; Statute of Maine, Rev. St. c. 115, cited in *Prescott v. Hobbs*, 30 Maine, 346; see a very able note to *Row v. Dawson*, 2 Leading Cases in Equity, 219, Amer. ed.

⁴ *Cowan v. Shields*, 1 Overton, 314; *Dunn v. Snell*, 15 Mass. 483; *Eastman v. Wright*, 6 Pick. 316; *Andrews v. Beecker*, 1 Johns. Cas. 411; *Raymond v. Squire*, 11 Johns. 47; *Suydam v. Jones*, 10 Wend. 180.

⁵ In cases where the covenantor was both nominally and really the plaintiff

and, perhaps, generally happens, that these covenants, when employed, are also accompanied by covenants for quiet enjoyment or of warranty, upon which the assignee can bring suit in his own name, and the cases show that he generally does so, and assigns the breach of each covenant respectively. Yet cases of actual injury may occur without a legal breach of the two latter covenants, where the assignee is excluded, by the rigor of the American rule, from a recovery upon the two former covenants, to which his assignor would have been entitled.¹

As the obstacle which prevents an assignee from suing on these covenants is merely technical, it may be presumed that if the American courts are restrained by authority from getting over it, and adopting the English rule, they will at least be prepared to sustain a suit in the name of the original covenantee, for the benefit of those claiming under him by purchase. This must be the case if an assignee of the land be held to be an equitable assignee of the covenant. Such must certainly be his position when the covenant is expressly assigned at the time of the conveyance, and the mere conveyance of the land may be thought to imply a transfer of the covenant, on the general rule that the assignment of the principal draws with it the accessory.

But whatever difference of opinion may exist as to

in the action, having previously assigned the land without any covenants on which he could himself be held liable, it would be obviously improper if he were allowed to recover damages. *Bickford v. Page*, 2 Mass. 460; *Niles v. Sawtell*, 7 id. 444; *Claunch v. Allen*, 12 Alab. 163. But this remark does not apply where the suit is nominally in the name of the covenantee, but really on behalf of his assignee.

¹ *Mitchell v. Warner*, 5 Connect. 526-7, is a strong instance of this.

the right of an assignee to take advantage of the covenants for seizin or against incumbrances, none exists as regards the covenants for quiet enjoyment and of warranty. These are, with entire unanimity on both sides of the Atlantic, held to enure to the protection of the owner, for the time being, of the estate which they are intended to assure, and they may be enforced at law, not only by the covenantee and his representative, but by heirs, devisees and alienees, who claim under the seizin vested in the original covenantee.¹

Thus in England, it is the theory of conveyancers to vest in every purchaser the benefit of all the prior covenants which have been entered into by the former vendors, and this, though each vendor may only have covenanted against his own acts. Thus, if A, B, C, and D, were successively purchasers and vendors of an estate, each covenanting only against his own acts; on the conveyance to C, he would acquire the same rights under A's covenant to B, as B had himself done, and by a conveyance to D, the latter would ac-

¹ "For instance, if A convey land to B and his heirs, to certain specified uses, or to such uses as C shall appoint, and covenant for title with B and his heirs, the right to sue upon the covenants will go with the seizin to the persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C under his power; so, if the conveyance were to B and his heirs, to such uses as C shall appoint, and in default of appointment to the use of C in fee, and A covenant with C and his heirs, and C (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee, it appears, can sue upon A's covenants; so if C, in exercise of his power, appoint the land to the use of D, and covenant with him and his heirs for title, C's covenants can be sued upon by the alienees of D; and in the two former cases, the right to sue upon A's covenants, and in the last case the right to sue upon C's covenants, will go with the land to all successive owners; and the heir or assignee, although not named in the covenants for title, may nevertheless sue thereupon." Dart on Vendors, 363-4; and see 2 Sugd. 489, &c.

quire all the benefit of the prior covenants of A to B, in addition to those which he had personally received from C.¹ It is evident however, that if the defect of title were caused by A, D would have no remedy upon the covenants of B or C; so if the defect were caused by C, he could sue neither A nor B. If the covenants were general, that is, not limited to the acts of the party covenanting, it would be otherwise; as for a defect caused by A, D could sue either A, B or C, but it is apprehended that if the defect was the consequence of C's acts, neither A nor B could be held liable, for it would be unreasonable that a man should be held responsible for the acts of future owners of the estate.

Mr. Preston was of opinion,² that covenants for title were incapable of being divided as to the benefit to be derived for them, and that if a vendor sold two farms, and covenanted with their purchaser and his heirs and assigns, and one of these farms were sold to a third person, the latter could never sue upon this covenant, because it might subject the covenantor to

¹ At one time doubt was expressed in New York by Spencer, J., in *Kane v. Sanger*, 14 Johns. 89, whether an assignee who had received a covenant could have an action against any but his own covenantor, but this was afterwards shown in the same State in *Withy v. Munford*, 5 Cowen, 137, to have proceeded upon a misapprehension of the language of Parsons, Ch. J., in *Bickford v. Page*, 2 Mass. 460, upon which the dictum in *Kane v. Sanger* was founded, and the doubt thus suggested has been frequently and decisively repudiated. *Booth v. Starr*, 1 Conn. 241; *Chase v. Weston*, 12 New Hamp. 413; *Williams v. Weatherbee*, 1 Aikens. 239; *Thompson v. Shuttuck*, 2 Metcalf, 615; *Suydam v. Jones*, 10 Wendell, 184; *Le Ray de Chaumont v. Forsyth*, 2 Penn. R. 574; *Markland v. Crump*, 1 Dev. & Bat. 94, (where is an opinion of Ruffin, Ch. J., expressed with his usual ability); *Herrin v. McIntyre*, 1 Hawks, 410; *Thompson v. Sanders*, 5 Monroe, 358.

² 3 Preston's Abstracts of Title, 57, 58. It seems to have been in great part owing to this reason that he stated that purchasers in general attached more importance to covenants for title than was deserved.

several actions; but this has been properly denied by Sir E. Sugden, who observes, "the better opinion seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such, an action would lie either for damages, which would be measured by the loss of the assignee, as far as he might be entitled to recover it under the covenant, or for an act to be done, *e. g.* further assurance, which might properly be confined to the particular proportion of the property. It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience, whereas the denial of the right to each assignee might lead to positive injustice, or if not, to greater inconvenience on their part;"¹ and this view seems well-established in this country.² So, it has been held that where the estate is divided, as where it becomes vested in a tenant for life, with remainder in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned to the extent of his estate.³

¹ 2 Vend. 508, citing *Hare v. Cator*, Cowper, 706; *Stevenson v. Lambard*, 2 East, 575; *Troynam v. Pickard*, 2 B. & Ald. 105; *Merceron v. Dawson*, 5 B. & Cress. 481; *Curtis v. Spitty*, 1 Bing N. C. 756; and see 9 Jarm. on Cov. 366. All these cases, however, except *Troynam v. Pickard*, were actions against assignees of a covenantor.

² *White v. Whitney*, 3 Metcalf, 87; *Hunt v. Amidon*, 4 Hill, 345; *Van Horne v. Crane*, 1 Paige, 455; *Astor v. Miller*, 2 id. 68.

³ *Noble v. Cass*, 2 Simons, 343; *White v. Whitney*, 3 Metcalf, 87. "Suppose," said Shaw, Ch. J., in that case, "A, holding an estate, protected by covenants of seizin and warranty against all incumbrances, but subject in fact to an outstanding mortgage, or to some defect of title, should make a mortgage to B; afterwards his equity of redemption is attached by C, his creditor, and in due time, and in legal form, this equity of redemption is sold at auction on execution, and conveyed to D by an officer's deed; would the benefit of the covenants, under which A held, pass by his mortgage to B, or by the sheriff's deed to D? We think this question is answered by saying, to both

It is evident however, that without some qualification to the doctrine which gives to subsequent alienees the right to sue upon the covenants of a prior vendor, it might work great injustice to the latter, by making him liable to all the subsequent owners in turn, and thus pay damages more than once for the same breach of covenant. To prevent such an application of this doctrine, it has been held by many cases that an intermediate covenantee cannot recover damages against a prior covenantor without having satisfied the damages to the covenantee who was evicted, as before this is done, the latter is the only party properly entitled to damages.¹

according to their respective rights in the estate. It is incident to the estate, and inseparably annexed to it. B, the mortgagee, being first in time, would be first in right, so far as necessary to his security as mortgagee; he is deemed seized of the estate, and of course to the same extent that he holds the estate, he is the assignee of the covenant. But D, the purchaser at the officer's sale, purchases the whole estate, subject to B's mortgage; to the same extent, and under the same limitations that he takes the estate, he is assignee of the covenant. Should B enter, to hold under his mortgage, and actually foreclose, he would hold the whole benefit of the covenant; but if D should pay off B's mortgage, as he would have a right to do, this would extinguish the mortgage; he would hold the whole estate, and of course, the whole interest in the covenant, as assignee in law. In such case, if suit were to be brought on the covenant, before either foreclosure or redemption, there might be a question, who would have a right to sue, or what damages the plaintiff would have a right to recover. It may be added by way of further illustration, that the purchaser at the sheriff's sale takes a defeasible estate only; the debtor has a right to redeem within a year, and reinvest himself with the estate; and should he do so, he would be reinstated in his right to the covenant of warranty attending it."

¹ Booth v. Starr, 1 Conn. 244; Chase v. Weston, 12 N. Hamp. 413; Williams v. Weatherbee, 1 Aiken, 239; Thompson v. Shuttuck, 2 Metcalf, 615; Suydam v. Jones, 10 Wend. 184; Markland v. Crump, 1 Dev. & Bat. 94; Herrin v. McIntyre, 1 Hawks. 410; Thompson v. Sanders, 5 Monroe, 358. "In the present case, said Swift, J., in delivering the opinion of the Court in Booth v. Starr, "the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages.

Many of the authorities which support this reasonable doctrine, liken the rights of the parties successively entitled to the benefit of a covenant running with the land, to those arising from the transfer of negotiable instruments, and a further illustration of such a resemblance has been shown in New York,¹

The question is, whether under these circumstances, he can maintain this action against the defendant, who is his immediate covenantor.

The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances; yet he can bring no action on the covenant till he is actually evicted; for till then, there has been no breach of the covenant, no damage sustained. By a parity of reason, the intermediate covenantees can have no right of action against their covenantors, till something has been done, equivalent to an eviction; for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor, would not bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied his subsequent assignees, for otherwise, every intermediate covenantee, might sue the first covenantor; one suit would be no bar to another; they might all recover judgment, and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees, for the same breach of covenant. In the present case, the plaintiff cannot know that his covenantee who has been evicted, will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial, and if the plaintiff in the meantime should become unable to refund the money, the defendant would, by operation of law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages, will have a claim for indemnity against a prior covenantor. The nature then of the engagement of the first covenantor is, to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant."

¹ *Suydam v. Jones*, 10 Wendell, 180, approved in *Greenvault v. Davis*, 4

where it has been held that the rights of an assignee of the land, upon the covenant for quiet enjoyment which accompanies it, cannot be affected by any equities created between the grantor and grantee of such land at the time the covenant was made by the former, unless, perhaps, there was express notice of them at the time of the assignment.

In the New England States, and, perhaps, in other parts of this country, there is sometimes inserted in conveyances of real estate, a covenant called "a covenant of non-claim," which is to the effect, that neither the grantor, nor any one claiming under him, shall, at any time, have or claim any right to the premises &c.¹ In an early case in Maine,² it was held, without hesitation, that the estoppel or rebutter created by such a covenant, passed with the land to a subsequent assignee. The same doctrine was shortly after repeated in that State,³ and has been adopted in others.⁴

Hill, 64; Sutherland, J., who delivered the opinion of the Court in the first of these cases, said: "If the covenant passes to the assignee with the land, it cannot be affected by the equities existing between the original parties, any more than the title to the land itself; and to allow a secret agreement in opposition to the plain import of a covenant running with the land, to control and annul it in the hands of a *bona fide* assignee, would be a fraud upon such assignee which the law would not tolerate." In these cases, evidence was held inadmissible, on the part of the defendant, to show, in mitigation of damages, that the consideration was less than expressed in the deed.

It is obvious, however, that such a course of reasoning would not prevent the assignee from showing it to be more than was expressed.

¹ As to the operation of such a covenant by way of estoppel and rebutter, see Chapter IX.

² *Fairbanks v. Williamson*, 7 Greenl. 96.

³ *White v. Erskine*, 1 Fairf. 306.

⁴ *Kimbell v. Blaisdell*, 5 New Hamp. 533; *Trull v. Eastman*, 3 Metcalf, 121; *Claunch v. Allen*, 12 Alab. 163.

But in a very recent case in Maine,¹ the circumstances were such that the application of this doctrine, combined with the peculiar doctrine of estoppel which prevails in parts of this country, would have lead to a decision inequitable in the extreme, and as the rule as to estoppel was thought to be too firmly established to be shaken, it seems to have been necessary, to the proper decision of the case upon the facts, to overrule the doctrine as to the covenant of non-claim, and it was therefore held, that "the doctrine asserted in the case of *Fairbanks v. Williamson*, cannot upon sound principles be admitted."

As respects the covenant for further assurance, there is not room for the same conflict of authority, as respects the right to take advantage of it, as exists between the English and American cases, with regard to the covenant for seizin; as although it is sometimes said that the covenant is broken by a demand and refusal to execute the deed of further assurance, yet it seems more proper to say that such a demand and refusal are necessary to the support of the action, but that the breach is a continuing one, even after that time, until the determinate damage has been suffered. In *King v. Jones*² the Court held, that if the ultimate damage had been sustained by the ancestor, that is, if he had lost the estate for want of the further assurance, he alone, or his executor after his death, would have the right to sue—but that "the ultimate damage not having been sustained in the time of the ancestor,

¹ *Pike v. Galvin*, 29 Maine, 183. See the dissenting opinion of Wells, J., in 30 Maine, 539. The case is considered in the ensuing chapter.

² 5 Taunt. 418.

the action remained in the heir, (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor," and there seem to be no American cases which have denied to an assignee of the land the benefit of a covenant for further assurance, even although the refusal may have been made before the assignment. But as the remedy under the covenant is almost invariably sought in a court of equity, it is probable that no difficulty would arise upon this point.

It has been already said that covenants which possess the capacity of running with the land, do not pass by direct operation of assignment, but as annexed and incident to the land to which they relate; and one of the most constant arguments made use of in the cases cited in a former part of this chapter, in order to prove the want of capacity of the covenant for seizin for running with the land, has been that if no land passes to the assignee, the covenants, which only pass as an incident to the land, must alike fail of assignment. However forcible this argument may be, as applied to the covenant for seizin, it will be observed that it possesses equal force when applied to the covenants for quiet enjoyment and of warranty, and would lead to the alarming consequences, that when a purchaser, by reason of the total loss of the land, most needed the help of his covenants for title, he would be utterly without aid from them. The question thus presented deserves consideration.

The argument is not wanting in authority to support it. In the early case of *Noke v. Awder*,¹ John

¹ Cro. Eliz. 417.

King had made a lease for years to Awder, the defendant, who conveyed it to one Abel, and covenanted that he and his assigns should peaceably enjoy it without interruption. From Abel the lease came by assignment to the plaintiff, who, being ousted by one Rober King, brought an action upon the covenant. The case was on the point of being adjudged for the plaintiff when Sir E. Coke, who was counsel for the defendant, raised this dilemma: In order to entitle the plaintiff to recover, he must show that he was ousted by a lawful and paramount title, it being well settled that the covenant is not broken by a mere tortious entry of a stranger; and if he show the eviction to be under paramount title, then nothing passed from the covenantor but a lease by estoppel, and as no estate passed, the subsequent assignee, who took nothing, of course lost the benefit of the covenant, which could only pass as an incident of the estate, and upon this ground the judgment for the plaintiff was arrested.

So in the more recent case of *Andrew v. Pearce*,¹ where a tenant in tail made a lease for ninety-nine years, with a covenant for quiet enjoyment. After his death, the lessee being still in possession, assigned the lease to the plaintiff, who, being evicted by the party entitled to the estate after the death of the tenant in tail, brought his action on the covenant against the executor of the original lessor, and Mansfield, Ch. J., held, that the lease having become absolutely void by the death of the tenant in tail, its assignment by the lessee to the plaintiff had no operation whatever. "He could neither assign the

¹ 4 Bos. & Pull. 162.

lease, nor any interest under it, because the lease was gone. What right of any sort had the assignee? If any thing, it could only be a right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently, there is no ground upon which the present action can be maintained.”¹

The remarks of Mr. Hare upon the doctrine of these cases are eminently correct. “The consequences of this doctrine,” says he,² “at the present day are very important. No inconvenience could arise from it under the old common law, except in the case of terms for years, when we have seen its effects in defeating a recovery in *Noke v. Awdler*. But to conveyances of freeholds it did not apply; as they were conveyed by livery of seizin, an actual estate, although commencing by tort, was in all cases transferred to the first feoffee, and by him to any subsequent assignee of the land. Of course when a feoffment was made, although the feoffor might have previously had nothing in the land, the feoffee took an estate of freehold, which was susceptible of being transferred to a second feoffee, and carrying with it all warranties and covenants made by the original feoffor. But in conveyances taking effect under the

¹ The distinction between this case and the recent one of *Williams v. Burrell*, 1 Common Bench R. 402, is, that in the former the decision was expressly put upon the ground, that the lease had become absolutely void by the death of the lessor *before* the assignment to the plaintiff. In the latter, the estate of the assignee did not become void until *after* the assignment, and, consequently, there was a chattel interest, which passed to the assignee, and which was sufficient to support the covenant. *Lewis v. Campbell*, 8 Taunton, 715.

² 1 Smith's Leading Cases, 121; Note to *Spencer's* case.

statute of uses, as must all those which are intended to pass an estate of freehold, and are unaccompanied by livery, nothing passes to the vendee, save only the estate actually and legally possessed by the vendor. Of course, therefore, in the very case in which the title to an estate totally fails, and in which the purchaser who has taken it on the security of the covenants for title, entered into by a previous vendor, most requires the assistance of the principle which gives to an assignee the right to sue on the engagements for indemnity given to his assignor, he is left, under the operation of the doctrine of *Noke v. Awdler*, as applied to our modern system of conveyancing, wholly without remedy.”¹

¹ Equally in point are the remarks of Taylor, J., in the case of *Nesbit v. Montgomery*, 1 Taylor's North Carolina Rep. 86. It is there said, that “it may be laid down as a rule without any exception, that a covenant to run with the land and bind the assignee, must respect the thing granted or demised, and that the act covenanted to be done or omitted, must concern the land or estate conveyed. But where it appears on the face of this declaration, that the one who sold this lot, neither had nor pretended to have any title to it, no title passed by the deed, and none could pass from the grantee to the plaintiff, and what is there to create any privity between the parties? The maxim *transit terra cum onere* presupposes a transfer of the land, and when that actually takes place, it forms the medium of a privity between the assignees. Suppose the covenants contained in this deed had been inserted in a separate instrument, unaccompanied with any conveyance of the land, no one would pretend that an assignee should take the benefit of such a contract. Then, can the case be materially altered by annexing these covenants to a deed of bargain and sale, which being a conveyance under the statute of uses, transfers only what the bargainor might rightfully convey. For the declaration shows that rightfully he could convey nothing. If one man covenants that another shall quietly enjoy or obtain a conveyance for an estate which is owned by a third, this binds the covenantor, and his executors and administrators to the cantee, but cannot extend to the assignees of the latter. Nor can I conceive, that the law is different when a man sells an estate and makes the same covenants, provided it appears upon the declaration that he had no right. In both cases the privity is wanting, which forms the basis of reciprocal remedies to the parties.” The doctrine

In order to avoid these consequences, a decision was made in New York in the case of *Beddow's Executors v. Wadsworth*,¹ which, though it may be unsustained by previous authority, is yet supported by strong grounds of convenience, and has been followed by subsequent cases. That case determined, that although the title itself might wholly fail, yet if *the possession* had passed to the assignee, he took a sufficient estate to carry with it the covenants for quiet enjoyment and of warranty. "No New York case," it was said by Cowen, J., who delivered the opinion of the Court, "was produced which denies that these covenants pass where the *possession* merely goes from one to another by deed, and there is afterwards a total failure of title: but there are several to the contrary."² Nor, when we take the word *estate* in its most comprehensive

upon which the cases which have been cited are based, was recognized in *Whittin v. Peacock*, 3 Bing. N. C. 411; *Green v. James*, 6 Mees. & Welsby, 656; *Nesbit v. Brown*, 1 Dev. Eq. R. 30, (in which case relief was given in equity, from the consequences of the decision in *Nesbit v. Montgomery*); *Randolph v. Kinney*, 3 Rand. 396, (where it was held that even equity could afford no relief); *Allen v. Wooley*, 1 Blackf. 149; *Beardsley v. Knight*, 4 Verm. 471.

At first it might be thought that the assignee might with reason, contend that the covenantor was estopped from saying that no estate passed by his deed; but the answer to this is, that it is indispensably necessary in a declaration for a breach of the covenant for quiet enjoyment or of warranty, to aver the eviction to have made by one lawfully claiming under title paramount, (*Noke v. Awder*, *supra*, and see cases cited on page 147,) and the plaintiff cannot, therefore, rely on the defendant's estoppel in opposition to his own averment.

¹ 21 Wendell, 120.

² "Withy v. Mumford, 5 Cowen, 137; *Garlock v. Closs*, id. 143; *Markland v. Crump*, 1 Dev. & Batt. 94; *Booth v. Starr*, 1 Connect. 244, 248." These cases, however, do not decide this, unless incidentally. Their point is, that an intermediate vendor cannot, in respect of his liability upon the covenant which he himself has given, recover of a prior vendor without first making good the damages of the party evicted. See *supra*, page 304.

meaning, can it be said there is none in such a case to which the covenant may attach. It is said by Blackstone to signify the condition or circumstance in which the owner stands with respect to his property;¹ and a mere naked possession² is an imperfect degree of title, which may ripen into a fee by neglect of the real owner.³ It is, in short, an inchoate ownership or *estate*, with which the covenants run to secure it against a title paramount; and, in that sense, is assignable within the restriction insisted upon. It is said in several cases that the covenants of warranty and quiet enjoyment refer emphatically to the *possession*, and not to the *title*.⁴ The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure, both of possession and title, according to the extent of such failure."

In Massachusetts, the case of *Slater v. Rawson*⁵ was decided nearly at the same time with *Beddoe's Exrs. v. Wadsworth*. A conveyance had been made, with covenants of good right to convey and of warranty, to one under whom the plaintiffs claimed as assignees, through several mesne conveyances. They yielded to an ouster under title paramount, which they clearly showed, but failed, in an action against

¹ 2 Black. Comm. 103.

² In the very recent case of *Fowler v. Polling*, 2 Barb. S. C. Rep. it was held that the possession referred to in this case as sufficient to carry covenants for title with it, meant a possession under claim or color of title. See *supra*, page 39.

³ *Id.* 195-6.

⁴ *Waldon v. McCarthy*, 3 Johns. 471; per Spencer, J., *Kortz v. Carpenter*, 5 *id.* 120.

⁵ 1 Metcalf, 456.

the original covenantor, to prove any actual occupancy or seizin of the land by him at the time of his entering into the covenants. On this ground the verdict for the plaintiffs was set aside, and a new trial ordered. "To support an action by an assignee on the covenant of warranty," said Dewey, J., "it is necessary that the warrantor should have been seized of the land; for, by a conveyance without such seizin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed, because, as no estate passes, there is no land to which the covenants can attach. If, therefore, the defendant, at the time of the making of his deed to Slater and Tyson, was not seized, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seizin, which covenant, for the reasons already stated,¹ is wholly unavailable to the plaintiffs."

On the subsequent trial, however,² the plaintiffs gave evidence that both the covenantor and his father had exercised acts of ownership over the property, and had claimed it as their own, been upon it, cut timber, &c. Although at *nisi prius* the judge seemed to be of opinion that these acts, being mere acts of trespass upon unenclosed wild land, would not operate as a disseizin of the true owner, yet a verdict was taken for the plaintiffs, and, upon a motion for a new trial, Wilde, J., held, that whatever might be the distinction between disseizin and dispossession, there was, according to modern authority,

¹ That is, because the plaintiffs sued as assignees of the original covenantee.

² Slater v. Rawson, 6 Metcalf, 439.

no legal difference between seizin and possession, nor was it necessary, it was said, to decide this question, "for if the defendant was in possession when he conveyed to Slater and Rawson, claiming to hold the whole land conveyed, he had a good right to convey his title, whatever it was."¹ His estate passed by his deed to the grantees, and all his covenants were binding;" and upon the familiar doctrine, that, although an actual possession may not amount to a disseizin as against the lawful owner, yet it will be good as against a mere stranger, it was held that "the defendant had acquired by possession and occupation a legal, though not an indefeasible title, to the land in question. He was lawfully seized and possessed of it against all the world, the lawful owner only excepted. His title, therefore, by his grant, passed to his grantees, and from them and intermediate conveyances, to the plaintiffs, with the covenant of warranty annexed, and for the breach of that covenant the plaintiffs are well entitled to damages." Judgment was therefore entered upon the verdict.

The reasons which, from convenience, may support these cases, will readily appear, when we consider that it has been by no means settled by that class of cases of which *Noke v. Awder* is at the head, what exact amount of interest is sufficient to carry with it covenants for title to an assignee, in other words, how small the estate might be which, passing to an assignee, would vest in him the benefit of these covenants.² Every liberal construction which can be reasonably adopted, should, therefore, be given, in order to avoid

¹ See this doctrine, which is almost peculiar to some of the New England States, attempted to be explained, *supra*, p. 37.

² See note to *Spencer's case*, 1 *Smith's Leading Cases*, *passim*.

the consequences at the present day of the technical doctrine of these cases. This doctrine, as has been before said, worked no evil, except with respect to leases, at the period when freeholds were conveyed by feoffment with livery. But, at the present day, it is far different, and when, as is always the case now, a conveyance passes no greater estate than the grantor himself had, it seems the height of hardship to deny to a subsequent assignee the benefit of that grantor's covenants, because no legal title to the land had passed with which those covenants could run. For, then, the more those covenants are falsified, the better the position of the covenantor; and when they are wholly broken, and no estate has passed from him, he is protected on this very ground. Hence, to hold, as has been done in New York and Massachusetts, that if the grantee has received under his deed a *possession*, which he has transmitted to his assignee, the covenants for title of the first grantor will enure to the latter, seems to be in accordance with the spirit and reason of their introduction.

So it has been held in Massachusetts,¹ that if one holding land under a deed containing covenants for title, should first mortgage it to one, and then the equity of redemption should be levied on and sold to another, the benefit of those covenants would enure to both the mortgagee and the sheriff's vendee, according to their respective rights in the estate. "The mortgagee being first in time, would be first in right, so far as necessary to his security as mortgagee; he is deemed seized of the estate, and, of course, to the same extent that he holds the estate, he is the

¹ *White v. Whitney*, 3 Metcalf, 81.

assignee of the covenant.¹ But the purchaser at the officer's sale purchases the whole estate, subject to the mortgage; to the same extent, and under the same limitations that he takes the estate, he is assignee of the covenant. Should the mortgagee enter, to hold under his mortgage and actually foreclose, he would hold the whole benefit of the covenant, but if the purchaser should pay off the mortgage he would hold the whole estate, and, of course, the whole interest in the covenant as assignee in law."²

The question thus presented was as between the mortgagee and the sheriff's vendee, the first having in strictness a conveyance of the legal estate, and the latter only an equity of redemption. Where there is no prior mortgage, there can be no doubt that the benefit of covenants for title which a debtor may have received, will pass by a sheriff's sale of his land to the purchaser.³

¹ This was distinctly held in *M'Murphy v. Minot*, 4 New Hamp. 454; *Carvis v. M'Clary*, 5 id. 529.

² "In deciding that the assignment of an equitable estate will pass to the assignee the right of suit, on covenants contained in a prior deed, granting to the assignor the legal estate in the same land, this case would seem to have no other support in the decisions of courts proceeding solely on common law principles and remedies, than the case of *Beddœ's Executors v. Wadsworth*, and to be in direct opposition to the general principles of the other cases cited above. At the same time, it must be admitted that it is supported by considerations of convenience, difficult to resist; since, from the frequent occurrences of mortgages, the passage of covenants with the assignment of land, must be seriously impeded if they are not held capable of running with an equity of redemption. There would seem to be no doubt that they pass of necessity, both as to their benefit and burden, with the legal estate, taken under a mortgage by a mortgagee. *M'Murphy v. Minot*, 4 N. Hamp. R. 454; *Carvis v. M'Clary*, 5 id. 529." Note to *Spencer's case*, 123.

³ *M'Crary v. Brisbane*, 1 Nott & M'Cord, 104.

CHAPTER IX.

THE OPERATION OF COVENANTS FOR TITLE BY WAY OF
ESTOPPEL OR REBUTTER.¹

THE operation of the feudal warranty by way of rebutter, was far more efficacious, in every day use, than its direct effect by means of a *warrantia chartæ*, and it was owing to the effect of this rebutter in its descent upon heirs, that the doctrines of lineal and collateral warranty had their rise. The benefit of the warranty enured to him who had received it, both as a means of redress and as a defence against the warrantor and his heirs,² and its principle in this respect was no doubt originally founded upon the desire to prevent circuitry of action, which would be occasioned if the warrantor or his heirs were allowed to regain possession of the land, as they would immediately be obliged by means of a *warrantia chartæ* to restore its value to the party from whom it had thus been taken.³ By the operation of this rebutter the warrantee was spared the expense of a law suit, and relieved from the risk of his warrantor's insolvency. Such in few words was the doctrine of rebutter.

The doctrine of estoppel was in its principle far

¹ The student may be profitably referred, on the subject of estoppel generally, to the very able and satisfactory note of Mr. Hare to the Duchess of Kingston's case, 2 Smith's Leading Cases, from which many of the remarks and opinions ventured in this Chapter have been suggested.

² Co. Litt. 365 a.

³ Co. Litt. 265 a.

different, though as regards the effect just referred to, there was a similarity between them — a rebutter being in this respect “a kind of estoppel.”¹ But while the former was entirely dependent upon the presence of a warranty, such was not the case with the latter, which had a wider scope, and was caused by matter of record, by matter of deed, or by matter *in pais*, and was called an estoppel or conclusion, “because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.”² As a consequence of this, it followed that a man was estopped by his own deed, and not permitted to aver or prove anything in contradiction to what he had once so solemnly averred.³

This was the ordinary and personal effect of an estoppel by deed. But it had also a much higher operation, which was, in certain cases, actually to transfer and pass an estate; so that if a man conveyed property, to which he had no title, to another, any after acquired title would enure to the latter by direct operation of law, and become vested in him in the same manner as if it had originally passed to him by the conveyance. There were two classes of cases in which an estate thus actually passed by estoppel. The first was where the mode of assurance was a

¹ Co. Litt. 352 b.

² Co. Litt. 352 a.

“The reason why estoppels are allowed,” says Mr. Butler, in his note to this passage, “seem to be these. No man ought to allege any thing but the truth for his defence, and what he has alleged once is to be presumed true, and therefore he ought not to contradict it. Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence; and therefore it is reasonable that some evidence should be allowed of so high and conclusive a nature as to admit of no contradictory proof.”

³ Plowden, 434.

feoffment, a fine, or a common recovery. Such was the solemnity and high character of these, that they always passed an actual estate, and divested the feoffor or consusor not only of what he then had, but of every estate which he might thereafter by any possibility acquire.¹ And this principle has been applied in modern times.² The second class of assurances which passed an after acquired estate by way of estoppel, were leases, and this seems to have been put upon the ground of such being the contract or agreement between the parties—the same contract which implied a covenant for quiet enjoyment from the word *demise* on the part of the lessor, and a covenant for payment of the rent from the words *yielding and paying* on the part of the lessee.³

These modes of assurance seem to have been the only ones by which an after acquired title was actually passed by direct operation of law under the

¹ Shep. Touch. 204–210, Co. Litt. 9 a., 49 a.; Plowden, 423.

² Doe v. Oliver, 5 M. & R. 202; Helps v. Hereford, 2 Barn. & Ald. 242. See the examination of Messrs. Humphries, Coote, etc., before the Real Property Commissioners, 1 Real Prop. Rep.

³ Bac. Abt. Tit. Leases, 296–441; Rawlins' case, 4 Co. 53; Weale v. Lower, Pollexfen, 60; Smith v. Low, 1 Atkins, 490; Trevivan v. Lawrence, 1 Salkeld, 276; Wells v. Austin, 7 Manning & Granger, 701; McKensie v. Lexington, 4 Dana, 129; (Granger v. Collins, 6 Mees. & Welsb. 459, contains nothing contrary to this; the declaration was clearly bad, and besides, the promise was there laid much more largely than the law implies from the relation between landlord and tenant.)

The doctrine of these cases is, indeed, one which naturally arises from the peculiarity of the relation between landlord and tenant, to which also other branches of the law of estoppel apply. The estoppel *in pais*, which prevents the tenant from denying the landlord's title, depends upon the tenant's obligation, express or implied, that he will at some time, or in some event, surrender the possession. The distinction between the relation of landlord and tenant, and that of vendor and vendee, is clearly recognized in Blight v. Rochester, 7 Wheat. 548, (Marshall, Ch. J.); Watkins v. Holman, 16 Peters, 54; Ostenhart v. Shoemaker, 3 Hill, (N. Y.) 518; Kenada v. Gardener, 3 Barb. S. C. Rep. 589; Page v. Hill, 11 Missouri, 149.

doctrine of estoppel. Thus a grant or a release had not this effect. They only operated upon the estate which the grantor or releasor actually had, "and therefore if a man grant a rent-charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the same manor, yet he shall hold it discharged,"¹ and this applied equally to a release.² So with respect to the conveyances in use at the present day, deriving their efficacy by virtue of the statute of uses, viz: deeds of bargain and sale, lease and release, etc. These instruments, passing no more than the actual estate of the party, have, as respects estoppel, no greater efficacy than the common law grant or release.

There was then an ordinary and an extraordinary effect attached to an estoppel. The first was personal in its character, like the rebutter in a warranty, and estopped the grantor and his heirs from doing or alleging any thing contrary to the tenor and effect of his sealed instrument. The latter, besides this quality, possessed the high function of actually transferring an after acquired estate, vesting it in the feoffee, conuzee, or lessee, according as the mode of assurance employed was a feoffment, a fine, or a lease, and this effect was peculiar to them alone, there being no authority in any of the English books to show that it was produced by any other species of conveyance.³

¹ Perkins, Tit. Grant, § 65; Wyvil's case, Hobart, 45; Touch. 240; Lampet's case, 10 Coke, 48.

² 49 Edward III. 14, 15, cited in Brooke's Abr. Estop. pl. 146; Right v. Bucknell, 2 Barn. & Adol. 278.

³ See Doe v. Oliver, 5 M. & R. 2 Smith's Lead. Cas. The quotation from Littleton, § 446, will be presently referred to.

But although instruments taking effect under the statute of uses did not possess the quality of actually transferring by estoppel an after acquired estate, nor even, as a general rule, of operating as a personal rebutter to prevent the grantor from setting up such estate in his own right, yet where it appeared in the instrument, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive, reciprocally, the very estate which was the subject of that instrument, they have been held to be estopped from denying the operation of the deed according to this intent,¹ this estoppel taking effect, however, by way of personal rebutter, and not actually transferring and vesting the after acquired estate by operation of law.

Having thus briefly sketched the outlines of this doctrine, in proceeding to its application, we find that on this side of the Atlantic, some early cases in New York, and perhaps in Maine,² broadly decided that where one who, by deed taking effect under the statute of uses, conveyed land to which he had no title, he was estopped by his deed from claiming any after acquired estate in it.

Whatever may have been the grounds of the above decisions,³ it was shortly afterwards held in New

¹ *Goodtitle v. Bailey*, Cowper, 559; *Carver v. Astor*, 4 Peters, 86; *Root v. Crock*, 7 Barr, 380; *Kinsman v. Loomis*, 11 Ohio, 478; *Decker v. Caskey et al.*, 2 Green. Ch. 449; *Williams v. Claiborne*, 1 Sm. & Marsh. Ch. 365. See *Jackson v. Waldron*, 13 Cowen, 189, per Walworth, Ch.

² *Fairbanks v. Williamson*, 7 Greenl. 96; *Jackson v. Bull*, 1 Johns. Cases, 81; *Jackson v. Munday*, 12 Johns. 201, and *Stevens v. Stevens*, 13 Johns. 316.

³ *Jackson v. Bull*, was decided by Kent, J., upon the following authorities. Cro. Car. 110; Co. Litt. 45 a, 47 b, 352 a, b; 4 Coke, 53 a; 2 Mod. 115; 6 id. 258; 1 Salk. 256; 2 Raymond, 1551; 3 P. Wms. 375, which indeed justify the conclusion that "if a man makes a lease of land by indenture

York,¹ that where one conveyed land to which he had no title, by deed of bargain and sale *without a covenant of warranty*, a subsequently acquired title would not enure to the benefit of the bargainee, even as against the bargainor and his heirs.² In this case the application of the principle was made to depend entirely upon the absence or presence of the covenant of warranty, which was made the test of the estoppel. A number of cases since then have adopted the rule so laid down, and it has been repeatedly held that the estoppel, as it is called, depends upon the warranty, and that the estoppel is to prevent circuity of action.³

which is not his, or *levy a fine* of an estate not vested, and afterwards purchases the land, he shall, notwithstanding, be bound by his deed and not be permitted to aver he had nothing, and the stranger to whom he sells will equally be estopped," but the difference between the modes of assurance here referred to, and conveyances under the statute of uses, has already been noticed. Nelson, J., in speaking (in *Pelletreau v. Jackson*, 11 Wend. 119,) of *Jackson v. Bull*, and *Jackson v. Munday*, said, "It does not appear in either of them whether there was a covenant of warranty or not. . . If not, though the doctrine of them may be sound, I apprehend there would be difficulty in reconciling them with the rule in *Littleton*;" etc. The rule thus referred to will be presently noticed. *Infra*, p. 335.

¹ *Jackson v. Wright*, 14 Johns. 193.

² In New Jersey, in the recent case of *Den v. Demarest*, 1 Zabriskie, 540, this point, which was elaborately argued, was left undecided. See *Gough v. Bell*, 1 Zab. 165.

³ *Jackson v. Hubble*, 1 Cowen, 613; *Jackson v. Winslow*, 9 id. 18; *Jackson v. Bradford*, 4 Wendell, 622; *Pelletreau v. Jackson*, 11 id. 119; *Jackson v. Waldron*, 13 id. 178; *Kellog v. Wood*, 4 Paige, 578; *Hoyt v. Dimon*, 5 Day, 479; *Dart v. Dart*, 7 Conn. 250; *Fox et al. v. Widgery*, 4 Greenl. 214; *Lowery v. Williams*, 13 Maine, 282; *Ham v. Ham*, 14 id. 351; *Baxter v. Bradbury*, 20 id. 260; *Pike v. Galvin*, 29 id. 185; (overruling, as to the operation of the particular covenant there employed, *Fairbanks v. Williamson*, 7 Greenl. 96;) *Kemball v. Blaisdell*, 5 New Hamp. 533; *Wark v. Willard*, 13 id. 389; *Middlebury College v. Cheney*, 1 Verm. 366; *Blake v. Tricker*, 12 id. 39; *Loomis v. Skinner*, 3 Pick. 52; *Wade v. Lindsey*, 5 Pick. 413; *Blanchard v. Brooks*, 12 Pick. 47; (see *Potter v. Potter*, 1 Rhode Island, 44.) *Gough v. Bell*, 1 Zabriskie, 165; *Douglass v. Scott*, 5

As a branch of the principle which these cases adopt, it is held, that where the covenant of warranty is a special or limited one, and the grantee would not be entitled to recover the value of the land, by reason of the defect of title not being one of the grantor's own creation, and therefore not coming within the covenant, there will be no estoppel.¹ So, in Maine, it is said, there will be no estoppel where the covenant is only one for seizin, because in that State, (and the rule would seem on the same principle equally to apply to the States of New Hampshire, Massachusetts, and Ohio), the covenant for seizin is answered by the transfer to the purchaser of an actual seizin, although it may be a defeasible one.² So, in the same State, where the covenant is what is called one

Ohio, 194; Hill v. West, 8 id. 222; Kinsman v. Loomis, 11 id. 475; Baker v. Morris, 15 id. 408; Dodswell v. Buchanan, 3 Leigh, 376; Massie v. Sebastian, 4 Bibb, 436; Logan v. Steel, 4 Monroe, 433; Logan v. Moore, 7 Dana, 76; Riggs v. Cook, 4 Gilman, 348; Robertson v. Gaines, 2 Humph. 383; Kennedy v. McCartney, 4 Porter, 159; Beam v. Welsh, 17 Alab. 772; Terret v. Taylor, 9 Cranch, 43; Blight v. Robertson, 7 Wheat. 548; Mason v. Muncaster, 9 Wheat. 455; Lewis et al. v. Baird, 3 McLean, 80; Bush v. Marshall, 6 Howard, 291; Sisson v. Seabury, 1 Sumner, 263.

In Reirdon v. Craig, 1 McCord, 411, and Harmer's lessee v. Morris, 1 McLean, 44, it does not appear whether there was a warranty or not, but it was held that the after acquired estate passed. In Brichard v. Hubbard, however, (11 Ohio, 316,) it was held that where the subsequently acquired title was a mere naked legal one, and the equitable estate was in a *bona fide* purchaser, the estoppel would not apply.

By the Revised Statutes of Arkansas, it is provided that if any person shall convey any real estate by deed purporting to convey the same, by fee simple absolute or any less estate, and shall not at the time of such conveyance have the legal estate in lands, but shall afterwards acquire the same, the legal or equitable estate after acquired, shall immediately pass to the grantee, and such conveyance shall be as valid, as if such legal or equitable estate had been in the grantee at the time of the conveyance." Rev. St. 188-9, § 4. Cocke v. Brogan, 5 Pike, 699.

¹ Comstock v. Smith, 13 Pick. 189; Trull v. Eastman, 3 Met. 121; Tillotson v. Kennedy, 5 Alab. 413.

² Fox v. Widgery, 4 Greenl. 218; Allen v. Sayward, 5 id. 231.

of non-claim, (that is a covenant that neither the grantor, nor any claiming under him, shall ever lay claim to the estate), it was very recently held,¹ that there will be no estoppel created, because no suit could be maintained upon such a covenant, and hence there would be no circuity of action.² So, where the

¹ Pike v. Galvin, 29 Maine, 185, overruling Fairbanks v. Williamson, 7 Greenl. 96; see the dissenting opinion of Mr. Justice Wells, published in 30 Maine, 539; and see Trull v. Eastman, 3 Met. 121.

² Pike v. Galvin was a very striking illustration of the extent to which the doctrine of estoppel may lead. Ward, being the owner of certain premises, agreed, in 1820, by articles, to convey them to Jellison, who entered into possession, but who did not, it seems, comply with the condition of the articles, and in 1823 assigned the contract to the plaintiff, and on the same day executed to him a release of the premises, containing a covenant of non-claim. In 1825, Ward conveyed the premises, *inter alia*, to Dyer, who, in 1829, conveyed them to Jellison. Jellison, in 1833, conveyed them to the landlord of the defendants. All these conveyances were on record. Jellison, and those claiming under him, had always been in possession, the plaintiff never having had the possession. Under these circumstances, the plaintiff claimed that, by virtue of the release with covenant of non-claim, from Jellison to himself, in 1823, the title acquired in 1829 enured to his benefit; but the Court held, (Wells, J., dissenting), that inasmuch as the release contained no covenant of warranty, but only a covenant of non-claim, the doctrine of estoppel could not apply. The covenant could not operate in favor of the plaintiff, "by way of estoppel, to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case, he would have been estopped, because the law will not permit one, who has, in such a solemn manner, admitted a matter to be true, to allege it to be false. 'This,' says Kent, 'is the reason and foundation of the doctrine of estoppels.' 4 Kent's Com. 261, note d, where he also says, a release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise; the covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct."

It is difficult, however, to imagine how a more solemn assertion could have been made than was contained in the covenant referred to, which was, "so that neither I, the said Jellison, nor my heirs, or any other person

deed of conveyance on its face purports to pass, not a perfect title, but only "the right, title, and interest" of the grantor; here, even though the deed has contained a general warranty, yet, in cases where that warranty is held to be limited and restrained by the estate conveyed, and not to warrant a perfect title, the doctrine of estoppel has been held not to apply.¹ So, where a deed, by reason of its imperfect execution, is insufficient to pass the estate, and, therefore, to support the warranty.²

There are two principles upon which most, if not

claiming from or under me or them, or in the name, right and stead of me or them, shall, or will by any way or means, have, claim, or demand any right or title to the aforesaid premises, or to any part or parcel thereof, forever." The decision of the case was perfectly correct upon the facts, as under the registry acts, Jellison's grantee in 1833 was not bound to search the record for conveyances by him prior to 1829, when Dyer had conveyed to him; and the application of the doctrine of estoppel would have been opposed to the theory of these statutes. At the same time, it is difficult to support the authority of the case upon the principles so well settled in New England; and it even became necessary to overrule some prior decisions in the same State, with respect to the covenant of non-claim, which had been recognized as law for nearly twenty years, and had been elsewhere approved. Wells, J., in his dissenting opinion, (published in 30 Maine), adhered, however, to the law as adopted generally in the Northern States, and was of opinion that the plaintiff was entitled to recover.

¹ "The grant in the deed," said Shaw, Ch. J., in *Blanchard v. Brooks*, 12 Pick. 67, "is of all his right, title, and interest in the land, and not of the land itself, or any particular estate in the land. The warranty is of the premises, that is, of the estate granted, and must be confined to estate vested. A conveyance of all the right, title, and interest in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein, at the time of the conveyance, but it passes no estate which is not then possessed by the party. *Brown v. Jackson*, 9 Wheaton, 452. The grant in legal effect operated only to pass the vested interest, and not the contingent interest, and the warranty being co-extensive with the grant, did not extend to the contingent interest, and, of course, did not operate upon it by way of estoppel." And to the same effect are *Wyman v. Harman's devisees*, 5 Grattan, 162; *Lewis et al. v. Baird et al.*, 3 M'Lean, 78; *Denby v. Jones*, 27 Maine, 361; and see *Kennedy v. Speer*, 3 Watts, 98.

² *Patterson's lessee v. Pease*, 5 Ohio, 193.

all of the above cases can be founded, with entire accuracy. One is, that the covenant of warranty operates as a personal rebutter merely, and, for the purpose of avoiding circuitry of action, preventing the grantor and his heirs from setting up the after-acquired estate, which equity would unquestionably compel them to convey to the prior grantee.¹ The other is, that the effect of the covenant of warranty is, as if a particular recital or averment had been introduced, and that the grantor was therefore estopped by his deed from denying its efficacy. Neither of these grounds, however, would have given the rebutter or estoppel the high efficacy of *actually transferring* the after-acquired estate.

The practical difference between these two effects, between a covenant of warranty operating as a rebutter, by placing the grantor and his heirs under a disability to claim the after-acquired estate, and operating as an actual transfer of that estate itself, is felt in two important connections; first, as between the purchaser and his heirs and assignees, on the one side, and the grantor and his heirs on the other; and, secondly, as between the purchaser and a subsequent purchaser from the grantor.

First, then, as between the purchaser and the grantor and his heirs. It would, at first sight, appear to make little difference whether the after-acquired estate actually passes to the purchaser by direct operation of law, or the latter is secured in his possession from the fact that the grantor and his heirs are not allowed to claim it—whether the pur-

¹ Lewis v. Baird, 3 M'Lean, 80; Henderson v. Overton, 3 Yerger, 397; Chew v. Barnet, 11 Serg. & Rawle, 389.

chaser has the actual good title vested in him, or the only person who has a better title is under a disability that prevents him from setting it up. The practical difference would seem to be this; where, by the high operation of an estoppel, the after-acquired estate actually vests by virtue of the covenant of warranty in the purchaser by mere operation of law, it would probably be held that this estate related back, and took effect as if it had passed by the conveyance to him; and hence in an action to recover damages for a breach of the covenant of warranty, a verdict would be ordered for the defendant; or, if the action were on the covenant for seizin, (if one had accompanied the covenant of warranty,) the plaintiff would be entitled to nominal damages only,¹ and thus, if the land had diminished in price, the purchaser would not have the option either to retain it, or offer to re-convey it and recover its consideration. On the other hand, if the acquisition of the after-acquired estate operates merely as a personal rebutter, or merely gives to the covenantee a right to come into equity for its conveyance to him,² he

¹ *McCarthy v. Legget*, 3 Hill, 134; *Baxter v. Bradbury*, 20 Maine, 260; *Cornell v. Jackson*, 3 Cush. 510.

² *Chew v. Barnet*, 11 Serg. & Rawle, 389, and see *infra*. "If, indeed," said the Court in *Beam v. Welsh*, 17 Alab. 773, "an estoppel could not operate as a conveyance, or as a medium through which the title would pass to him in whose favor the estoppel works, we might frequently lock up the title in him and his heirs, against whom the estoppel operated, and the party for whose benefit it was intended might find himself without title, and unable to recover from a mere intruder; for if the title to the after-acquired estate did not pass to the grantee by means of the estoppel, but it only precluded the grantee from asserting an after-acquired title, it would be difficult to see how he could recover in ejectment from one who had no title. To show title in another would not enable him to recover, and he, having none, could not maintain the suit. To give, therefore, the full effect to an estoppel, it is clear, that it must frequently operate to pass the title." The

would have the option of either doing this or recovering damages on his covenant, and the covenantor could not compel him to do the one in preference to the other.¹

mistake, however, seems to be in supposing that the purchaser's remedy is necessarily at law, instead of being in a court of equity.

¹ Thus, in a recent case, *Tucker v. Clarke*, 2 Sandf. Ch. R. 96, the purchaser refused to receive a valid title which his vendors tendered to him, together with the costs of an action, which he had instituted for a breach of his covenants. The vendors having filed a bill to compel him to accept this title, it was dismissed by Sandford, Vice Ch., who said: "The complainants do not ask the Court to compel a specific performance of an open agreement. They seek to compel the defendant to give up his claims under a deed executed seven years before the bill was filed. The executed contract was, that the complainants were seized of these lots, and, if they are not, that they should repay the consideration money. This is sought to be reconsidered and turned into a contract, by which, if it should ever turn out that they were not seized, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there were a semblance of mutuality about it, so that the defendants might have caused them to procure a good title on discovering the effect. But there is no pretence that the defendant had any such equity. The complainant's ground amounts to this: If the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore him to the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him, and retain the price which he paid. There is no equity or fairness in this, and the Court cannot grant the relief prayed by the bill, without first making such a contract for the parties; a contract which they never did make, and, I presume, never would have made, if any failure of title had been supposed probable when the conveyance was executed." And to the same effect was the decision in *Bingham v. Weiderwax*, 1 Comstock, 513. In *Woods v. North*, 6 Humph. 310, an executor sold with a covenant, that as executor he was seized, and had good right to convey, property which, in fact, belonged to himself, in common with other devisees of the testator, and which by the will he had no authority to sell. The purchaser filed a bill to rescind the contract on the ground of imposition, and pending this, the premises were sold by the devisees, and purchased by the defendant, who then tendered a deed in his individual capacity. But the Court held that this offer presented no good reason for denying the relief prayed by the bill. "If the complainant were compelled to take this title, the price he agreed to give for the land would enure to the individual benefit of the defendant. He has purchased the land, and is bound to his co-heirs only for the price he bid at the sale,

Secondly, as between the purchaser, and a subsequent purchaser from the grantor. The practical results of this doctrine of estoppel, when applied as between the purchaser and the grantor, yield in importance to those which arise in the connection we are now to consider. It has been repeated, that the cases which have been cited hold that the estoppel created by a warranty operates actually to transfer the after-acquired title, by mere operation of law. The principle was thus stated in a recent case.¹ "The obligation created by estoppel," said Lane, J., in delivering the opinion of the Court, "not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterwards acquire the title, take it subject to the burden which the existence of the fact imposes on it." And such have been the principles recognized

under the decree before mentioned, while he would get all the benefit of the exorbitant price, it may be, which the complainant was to give. But if a party fraudulently sell and convey an estate to which there was no title, the vendor who comes into equity to rescind the contract, will not be compelled to take an after-acquired title from the vendor." (This case is not affected by *Blackmore v. Shelby*, 8 Humph. 449, for there the contract had not been consummated, by execution of the deed; and it is familiar that the vendee will be compelled to take the title, if acquired by his vendor, at any time before final decree.) It may be remarked of *Woods v. North*, that the presence of fraud in the case was only material in giving the plaintiff a standing in equity to rescind the contract, and the principle of the case applies equally in any case where, from other circumstances, the plaintiff would be entitled to relief in equity, or to damages on his covenants in a court of law.

¹ *Douglass v. Scott*, 5 Ohio, 198.

in many other cases.¹ Such a course of decision leads to the result that the after-acquired title vests

¹ *Massie v. Sebastian*, 4 Bibb, 436; *Wark v. Willard*, 13 New Hamp. 389; *White v. Patten*, 24 Pick. 324; *Dudley v. Cadwell*, 19 Connect. 227; *Pike v. Galvin*, 29 Maine, 185; *Bank of Utica v. Mersereau*, 3 Barbour's Ch. R. 567. The conclusion to which these cases tend, is stated with such fairness by Walworth, Ch., in the very recent case of the *Bank of Utica v. Mersereau*, that it seems proper to quote his remarks. "By the common law, if a grantor, who had no interest, or only a defeasible interest, in the premises granted, conveyed the premises with warranty, and afterwards obtained an absolute title to the property, such title immediately became vested in the grantee, or his heirs or assigns, by estoppel. (Coke Litt. 265, a.) And if the grantor, or any one claiming title from him subsequent to such grant, sought to recover the premises by virtue of such after-acquired title, the original grantee, or his heirs or assigns, by virtue of the warranty which ran with the title to the land, might plead such warranty, by way of rebutter or estoppel, as an absolute bar to the claim. (Co. Litt. 365 a. Termes De La Ley, tit. Guaranty. Toml. L. D. art. Rebutter). This principle has been applied to all suits brought by persons bound by the warranty, or estoppel, against the grantee or his heirs or assigns, so as to give the grantee, and those claiming under him, the same right to the premises as if the subsequently acquired title or interest therein had been actually vested in the grantor at the time of the original conveyance from him with warranty, where the covenant of warranty was in full force at the time when such subsequent title was acquired by the grantor, (*Jackson v. Wright*, 14 Johns. Rep. 193; *Brown v. McCormick*, 6 Watts, 64; *Comstock v. Smith*, 13 Pick. 119.) And where an estoppel runs with the land, it operates upon the title, so as actually to alter the interest in it, in the hands of the heir or assigns of the person bound by the estoppel as well as in the hands of such person himself. Thus, if a man by deed indented, make a lease of land, reserving rent, which implies a warranty on the part of the lessor, and the landlord has no interest in the land at the time of the execution of the lease, if he afterwards purchases the land, and then sells it to a stranger, the latter will hold it subject to the lease; and coming in as the assignee, or grantee, of the person who made the lease, will be estopped from showing that the lessor had no interest in the land at the time he made such lease. 1 Coke Litt. 19 Lond. ed. 47, note 11; 7 Bac. Abr., Warranty, L.; *Bull v. Wiott*, 1 Rolle's Abr. 868; *Somes v. Skinner*, 3 Pick. Rep. 52; *Trevivan v. Lawrence*, 6 Mod. Rep. 258). For as a covenant of warranty runs with the lands, so as to give the heirs and assigns of the grantee the benefit of the estoppel as against the warrantor, it runs with the subsequently acquired interest of the warrantor, in the hands of the heirs and assigns of the latter, so as to bind that interest by the estoppel, as against any person claiming the same under him, *in the post*."

in the grantee, not only as against the grantor and his heirs, but as against a subsequent purchaser from him of the after-acquired title.

Such a result, if applied to the case of a *bona fide* purchaser without notice, cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, which cannot certainly be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance, (though without title), to any other person; for if he has, that person will hold the estate as against this purchaser—and if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has thus passed.¹

If the rule were limited in its application to cases

¹ This argument was pressed upon the Supreme Court of Massachusetts in *White v. Patten*, 24 Pick. 324, and disregarded. The facts of that case afford a striking illustration of the result referred to in my text. On the 30th of December, 1833, Thayer, who had no title whatever to certain land, but who was in possession, mortgaged it to White with covenant of warranty, who put his mortgage on record on the 13th of February following. On the 20th of July, 1834, Perry, the father-in-law of Thayer, conveyed this land to the latter, who the next day mortgaged it to Patten. This mortgage, and the deed from Perry to Thayer, were recorded on the 2d of August following. Thayer continued in possession until 1835, when he was dispossessed by Patten, under an execution upon a judgment obtained against him. A writ of entry was then brought by White against Patten. Under these circumstances, Patten's counsel urged, with great force, that under the registry acts, Patten had done enough to search the record back to the time when Thayer acquired title, that is, from July 20th, 1834. Any search before that time should properly be directed to conveyances or mortgages given by Perry, the real owner, and not by Thayer, who had no shadow of title. Nevertheless, the Court held, upon the authority of cases arising under *leases*, (see them cited *infra*, on page 341, the principle is

where it was capable of being put upon the ground of personal rebutter, for avoiding circuity of action, then such a result could not in any event occur, for although there would be a circuity of action, if the *heir* of the covenantor were allowed to reclaim the estate in opposition to his ancestor's deed, inasmuch as he would be immediately compelled to restore its value by an action on the covenant, yet such would

wholly different), that the estoppel created by the mortgage in 1833, bound the subsequent mortgagee of the after-acquired title, and the case was decided in favor of the demandant. Such an application of the principle of estoppel strikes a decisive blow at the protection intended to be afforded by our registry acts. It is, moreover, curious, that the case was perhaps rightly decided upon the facts, but the point was overlooked in the decision. Thayer, the mortgagor, was *in possession*, which might have been enough to put the subsequent mortgagor upon inquiry, and thus deprive him of the protection otherwise afforded by the registry acts, as these acts are only intended to protect a purchaser who is without actual or constructive notice. It is evident, however, that many cases might occur in which there is no actual possession, and where, therefore, the element of notice could not be introduced to the prejudice of the subsequent purchaser.

While these sheets are going through the press a case has occurred in practice which further illustrates the doctrine here referred to. Land which was subject to a ground rent was sold to a purchaser "under and subject to the payment of the said ground rent," but at the end of the *habendum* was inserted, "freed, exonerated, discharged, and forever indemnified and saved harmless against him, the said (vendor) and his heirs, of and from the said ground rent, and every part thereof." A year after this deed was executed, the ground rent was conveyed to this vendor. Upon a sale made by the original purchaser, it was objected to the title, that although by the words in the *habendum*, the vendor and his heirs were estopped, yet that, in case the ground rent should be conveyed to a subsequent purchaser he would not be bound to search the record for conveyances by his vendor prior to the time when he acquired title to the ground rent, and a release was therefore required and obtained from the original vendor. Such a release would have been needless, if the doctrine of *White v. Patten* be sound, as the estoppel created by the covenant would have operated even upon a subsequent purchaser from the original vendor. It may, moreover, be observed that, in this case, there could be no merger of the ground rent, for the title to the ground and the rent was never united in the same person at one time. In *Charnley v. Hansbury*, (1 Harris, Penna. 16) this principle was applied in a case of some apparent hardship.

not be the case as regards the *assignee* of the covenantor. He would be under no obligation to the covenantee or any one claiming under him; there would be no risk of liability to circuity of action, and consequently no rebutter.

There are, moreover, two classes of cases which appear to show that the doctrine of estoppel, as applied in many of our States, to passing an after-acquired estate, is not based, as many authorities would seem to found it, solely on the principle of preventing circuity of action. One of these is, as has just been seen, where the question has arisen between the assignees of the original title and the assignees of that subsequently acquired; the former having, of course, no right of action against the latter, there can be no circuity of action. The other class of cases is where it has been held that although by a married woman's joinder with her husband in a covenant of warranty she cannot be held liable in damages after his death, yet that the covenant will estop her, and those claiming under her, from setting up any claim to an after-acquired title.¹ The rule,

¹ *Hill's Lessee v. West*, 8 Ohio, 226; *Massie v. Sebastian*, 4 Bibb, 436; *Fowler v. Shearer*, 7 Mass. 21; *Colcord v. Swan*, id. 291; *Nash v. Spofford*, 10 Met. 192. "These decisions," it was said, in *Hill's Lessee v. West*, "may not seem to be founded upon the reasons which are usually assigned why the covenants in a deed should operate by way of estoppel, that is, to prevent circuity of actions; still they seem to us to be reasonable, and such as tend to the furtherance of justice; and when a married woman undertakes, in conjunction with her husband, to convey his land with covenants of warranty, it is sufficient to protect her from the payment of damages for the breach of those covenants; for all other purposes they should be held operative. If, then, after the execution of the deed to the lessor of the plaintiff, Hildah and Mary Wilcox acquired title to the premises in controversy, that title enured to the benefit of the lessor of the plaintiff, and neither they or those claiming under them shall be permitted to defeat the plaintiff by setting up this after-acquired title."

however, adopted by this class of cases as to the estoppel of a married woman, has not been universally recognized;¹ and, in some States, the operation of such a rule is prevented by statutory enactment.²

It is believed, and so, indeed, the authorities seem to prove, that the doctrine which has been adopted in giving to the covenant of warranty all the high operation of an estoppel in passing an after-acquired estate by mere operation of law, and connecting it with the principle of preventing circuity of action, has arisen from a peculiar view which has been adopted of a single section of Littleton, and the commentary of Lord Coke upon that section. The passages referred to are these. In section 446 of Littleton, he says: "No right passeth by a release but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseized, and the son, (living his father), releaseth by his deed to the disseizor all the right which he hath or may have in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseizor, for that he had no right in his father's life, but the right descended to him after the release made by the death of his

¹ Jackson v. Vanderhayden, 17 Johns. 167; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Wadleigh v. Glines, 6 N. Hamp. 18; Den v. Demarest, 1 Zabriskie, 541.

² Thus, in Virginia, the Revised Code of 1849 declares, that a privy examination of the wife shall operate to pass the right of dower, and all right and interest of every nature which, *at the date of such writing*, she may have, but such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein. This was taken in substance for a prior act re-enacted in 1819, (and was, perhaps, called into being by the case of Nelson v. Harwood, 3 Call, 342; see *supra*, ch. xii.), and similar enactments prevail in the States of Illinois Indiana, Michigan, and Missouri.

father;" to which Lord Coke adds: "If there be a warranty annexed to the release, then the son shall be barred, for albeit, the release cannot bar the right for the cause aforesaid, yet the warranty may rebut and bar him and his heirs of a future right which was not in him at that time, and the reason, (which is in all cases to be sought out), wherefore, a warranty, being a covenant real, should bar a future right, is for avoiding a circuitry of action which is not favored in law, as he that made the warranty should recover the land against the terre-tenant, and he by force of the warranty, to have as much in value against the same person."¹

It will be observed that, in the above passages, the word "estoppel" is not employed.² The doctrine seems not to be thought a branch of the law of estoppel—the warranty operates by way of rebutter, to avoid circuitry of action, an effect far different from that of estoppel, for, although Coke, in another part of his Commentary, speaks of rebutter as being "a kind of estoppel," yet, as has been said, this has reference merely to the ordinary and personal effect of an estoppel, and not to its extraordinary effect of actually passing an estate. If such had really been the case, the whole system of feudal conveyances would have been deranged. All distinction between the common law modes of assurance would have been confounded,

¹ Co. Litt. 265 a.

² The following sentence from Co. Litt. 352 a, is often quoted in connection with them: "Privies in blood, as the heir, privies in estate, as the feoffee, lessee, &c., privies in law, comprehending those who came in by act of law, or *in the post*, shall be bound by, and take advantage of estoppel;" but, it is believed, that no authority can be cited to show that a warranty, unaccompanied by a feoffment or fine, made by one who had no estate, to another who had no previous estate, possessed this quality of an estoppel.

and a grant or a release, with warranty, would have been as effectual in the transfer of a future estate as a feoffment or fine.¹

The passages in Littleton and Coke may perhaps be better applied to the law at the present day, by a single reference to one of the principles upon which warranty was based. It was one of the peculiar attributes of a warranty that it required an estate to support it.² Such an estate was created by a feoffment, or a fine, the solemnity of which was such as to create and pass an estate whether rightfully or wrongfully.³ To a feoffment, livery of seizin was necessary; but livery of seizin could not be given unless the feoffor had the actual possession; and when this was the case, the delivery of the possession (of which the charter of feoffment was merely the authentication) was an act of such notoriety as to pass an actual estate to the feoffee—an estate of fee simple, if the feoffor so willed it. Such an estate could support a warranty. The same rules applied to a fine, which was of equal solemnity and notoriety as a feoffment, and indeed always presupposed one, and which, moreover divested all remainders and interests whatever. When, therefore, one attempted to convey to a stranger, land to which neither of them had a title, it was necessary to obtain the possession, and when this was done, although the feudal law declared that his feoffment should pass an estate, yet it was an estate subject to be divested by the lawful owner, and which was not assisted by the warranty, either by way of estoppel

¹ See the able note to the *Duchess of Kingston's case*, 2 Smith's Leading Cases.

² *Seymour's case*, 10 Rep. 96; *Pratt v. Oliver*, 3 McLean, 39; *Kirchenval v. Triplett*, 1 A. K. Marsh, 495.

³ Litt. § 599-611; Co. Litt. 387 a.

or otherwise. Nor in fact had the warranty any operation whatever when the possession was wrongfully obtained, it being an inflexible rule that a warranty commencing by disseizin, and made for the purpose of giving effect to that disseizin, was void.

Now a grant or a release did not possess the high qualities of a feoffment or fine.¹ A grant as applied to corporeal hereditaments passed estates in reversion or remainder—a release operated to relinquish an interest or claim to one already in possession. Neither of them possessed the power to create and transfer an actual estate where none previously existed. It was a familiar principle that a warranty could not enlarge an estate, and consequently it could not make valid, that which would otherwise be invalid. Hence it follows that a grant or a release with warranty, of a defeasible estate, or no estate at all, to one having no previous interest, was as ineffectual as if there had been no warranty. Had this been otherwise—had the effect of a warranty been to convey to a grantee or releasee any subsequently acquired estate, there would have been an end of the common law rule, that a future estate could not be barred by a mere deed to a stranger. If, however, the grantee or releasee had a previous interest or estate in the land, the warranty would knit itself to that, and, having then something to support it, would rebut the warrantor and his heirs in the same manner as if the supporting estate had been created by a feoffment or fine.

¹ See the celebrated argument of Mr. Knowler in *Doe v. Whitehead*, 2 Burrow, 704.

² Fourth resolution in *Spencer's case*, 3 Rep. 16. So in *Holland v. Jackson*, J. Bridgman's Rep. 77, "Warranties do bind only rights and actions which are *in esse* at the time of the warranty made, and not rights and actions which are to accrue after the warranty created."

By the application of these principles to the case put by Littleton, it will be seen that the release would, of itself, have had no operation whatever, and indeed he says as much in the first sentence. The son having no estate, the release of course passed none. The reason why the warranty was efficacious in the case he puts, is that *the releasee* had an estate to which the warranty could attach itself, and that the ancestor's estate had been put to a right of entry before the warranty was made. Had this not been so—had the father's estate still continued in him, the warranty would have been utterly void. Of the ten requisites usually mentioned as necessary to give effect to a warranty, there are two which are here essentially applicable. First, that the estate to be barred should have been divested and put to a right of entry before, or at the time when the warranty was made; and secondly, that the estate of the warrantee should have had a substantial existence before or at that time.¹ Both of these requisites were present in the case referred to. The estate of the father had been divested and put to a right of entry before the warranty made by the son, and also the warrantee had a substantial interest or estate at the time he received the warranty. If the warrantee had been a total stranger, he would have had no previous estate to which the warranty could be attached, and as the release only passed what estate the releasor had (which was no estate at all) and did not, like a feoffment, create an actual estate, the warranty would have been wholly inoperative. If the mere addition of a warranty could have produced the effect supposed to have been

¹ Touchstone, 186.

attributed to it—if estoppel and warranty had been as identical as they are supposed to be, and if the interest when it accrued fed the warranty, the introduction of conveyances under the statute of uses, would have been needless,¹ and future estates could have been transferred to a mere stranger without the notoriety of a feoffment or fine.²

It is not meant by these remarks to deny that the presence of a covenant of warranty may not properly operate as a personal rebutter, which will prevent the grantor and his heirs from getting possession of the land when he or they subsequently acquire a title to it. Such a principle seems to be correct, but it is, with great deference, submitted that it is not strictly a branch of the law of estoppel, in the absolute and technical sense in which that word has in some cases been used.³

¹ A bargain and sale with warranty by a tenant for life, would according to this doctrine have produced a discontinuance—a result not properly attributed to such a mode of conveyance as a general rule. *Gilbert's Tenures*, 119; *McKee v. Prout*, 3 Dall. 486. *Preston's Law Tracts*, Tract 2.

² So, to render effectual a covenant to stand seized to uses, it was necessary that the covenantor should have a vested estate, and therefore a covenant to stand seized of land, which the covenantor should afterwards purchase, was void. 2 *Sanders on Uses*, 83. “A man cannot by a covenant raise a use out of land which he hath not.” *Yelverton v. Yelverton*, Cro. Eliz. 401; *S. C. Moore*, 342.

³ A class of cases should perhaps be referred to which are often quoted to support the connection between a covenant of warranty and estoppel. These are cases of leases, where the lessor's subsequently acquired estate, enures to the benefit of the lessee, and a subsequent purchaser takes the land subject to the lease. *Rawlins' case*, 4 Coke; *Trevivan v. Lawrence*, 1 Salkeld, 276; *Weale v. Lower*, Pollexfen, 66. But these cases proceed upon a different principle. In the first place, the absence or presence of a warranty formed no part of them, and we have no reason to suppose, as was suggested in *Pelletreau v. Jackson*, that the decision in *Rawlins' case* turned upon the implied covenant for quiet enjoyment. Secondly, the relation between the landlord and tenant is, in every degree, more peculiar than that of vendor

It is evident, however, that in this country a peculiar effect has, at least in many cases, been given to the covenant of warranty, which is deemed to possess, as respects this doctrine of estoppel, an efficacy denied to the other personal covenants for title. It seems to have been thought that a covenant that the vendor was seized, or that the purchaser should quietly enjoy, was less powerful in this respect than a covenant to warrant and defend the land itself. As such a covenant is seldom or never employed in English conveyancing, the doctrine of estoppel which is based upon its presence, may be said to be at the present day, exclusively an American one. According to this doctrine, a deed with covenant of warranty on this side of the Atlantic may, perhaps, be likened to a deed to lead the future uses of a fine or a recovery in England.¹

In Pennsylvania it cannot be said that the doctrine adopted by the New England cases has been recognized to its full extent, viz. that when a conveyance contains a covenant of general warranty, an after acquired title actually passes by estoppel—at least it cannot be said to depend entirely upon the presence or absence of a covenant of warranty. In an early

and purchaser. There is always an understood contract between them that the lessor is conveying an estate which will support the lease, and there is room for the operation of estoppel in its highest function.

¹ The doctrine held by the English courts at the present day on the subject of estoppel, will be found *infra* at page 345. It may perhaps be argued in favor of the doctrine of estoppel as held in many parts of this country, that the effect of a covenant of warranty is to raise a use in favor of the purchaser, which the statute would at once execute; but the answer to this may perhaps be, that it was requisite to the execution of an use under the statute that there should be an estate or seizin, out of which the use was to arise, and therefore contingent uses, during the suspension of the contingency, could not be executed by the statute. 1 Sanders on Uses, 231.

case,¹ Tilghman, Ch. J., in delivering the opinion of the Court said, "J. M. sells and conveys land to which he has no title, but afterwards acquires title. Can his heirs recover against his grantees? It appears to me that in such case they would be estopped by their father's deed from denying his title, and if there were occasion for farther assurance, equity would compel them to make it," and Yeates, J., added "in equity a grantor conveying land for which he has no title at the time, shall be considered a trustee for the grantee, in case at any time afterwards he should acquire title." So in a very able opinion by Gibson, Ch. J., in *Chew v. Barnet*,² he held that the acquisition of the subsequent title enabled the prior purchaser to demand in equity a conveyance from the grantor, but, "not as vesting the title in him of itself, as contended for, by estoppel. . . In the case of a conveyance before the grantor has acquired the title, the legal estate is not transferred by the statute of uses, but the conveyance operates, as I have said, as an agreement which the grantee is entitled to have executed in Chancery."³ In *Brown v. McCormick*,⁴ however, it was held that an after acquired estate, "by operation of law imme-

¹ *McWilliams v. Nisley*, 2 Serg. & Rawle, 515.

² 11 Serg. & Rawle, 389.

³ See accordingly *Taylor v. Dabar*, 2 Cas. in Ch. 212; *Noel v. Bewley*, 3 Simons, 103; *Smith v. Baker*, 1 Young & Collier's Ch. 223; *Jones v. Kearney*, 1 Drury & Walsh, 159.

⁴ 6 Watts, 64.

This was a strong case; McConnel claiming to own the premises under a survey, conveyed in 1788 to Harvey, by deed containing covenants for seizin and general warranty. Nine years after, the real owners, Uriah David and Mercer Brown conveyed to McConnel, who, to secure the payment of the consideration money, on the same day gave his bonds with a warrant of attorney to enter judgment, and judgments were entered upon them six days after. Under these judgments the premises were sold by the sheriff, whose vendee brought ejectment against those claiming under Harvey; and Rogers,

diately passed to the grantee." In *Kennedy v. Speer*,¹ there was a mere assignment of a title acquired under a treasurer's deed, which it was held did not estop the grantor himself from afterwards claiming the land

J., who delivered the opinion of the Court, said, "The first question is as to the legal effect of the deeds, which the Court below decided was to pass immediately to Harvey all the right which Robert McConnel acquired in the land by virtue of the deed from the Browns to him. And this is a principle too well settled to admit of dispute. When a person conveys land, in which he has no interest at the time, but afterwards acquires a title to the same land, he will not be permitted to claim in opposition to his deed, from the grantee, or any person claiming title from the grantee. 12 Johns. Rep. 207; 11 Johns. Rep. 91; Co. Litt. 265. The operation of the principle is, that immediately on the execution of the deed of the 10th of November, 1797, from David Brown and others to Robert McConnel, it enured to the benefit of William Harvey, the grantee of the land, by virtue of the previous deed of the 2d of January, 1788. At that period, therefore, by operation of law, William Harvey was the owner of the premises in question. And the legal effect will be the same, whatever may have been the intention of McConnel in making the purchase from Brown, although the presumption undoubtedly is, that it was intended, in good faith, to carry into effect his sale to William Harvey. But it is alleged, that the judgment on which the plaintiffs claim, being for the purchase money, although not entered until six days after the conveyance, is a lien on the property conveyed by Brown to McConnel. But bonds, with a warrant of attorney to confess judgment, although given to secure the purchase money, are but a personal security, until judgment entered, and consequently after the delivery of the deed and before the judgment had, the grantor had no lien. In the intermediate time, it was in the power of McConnel to make any disposition of the land he pleased, either by sale or by subjecting the premises to the lien of other incumbrances. And this conveyance the vendor can only avoid, by entering his judgment the same day the deed is delivered, or by taking a mortgage on the property sold, for security of the purchase money. The counsel for the plaintiff in error relies on *Chew v. Barnet*, 11 Serg. & Rawle, 399; but that case merely decides the general principle that the purchaser of an *equitable title* takes it subject to all the countervailing equities to which it was subject in the hands of the person from whom he purchased. But here, by the conveyance from Brown to McConnel, McConnel acquires a legal title to the premises, without the lien of any incumbrance whatever, whether legal or equitable, which, by operation of law, immediately passes to his grantee." In the subsequent case of *Bellas v. McCarthy*, 10 Watts, 26, it was said by the same learned Judge that *Chew v. Barnet* "must be viewed with reference to the case decided."

¹ 3 Watts, 98.

under a subsequently acquired title. But in *McCall v. Coover*,¹ the principle that an after acquired title enured to a prior vendee, was acted upon entirely irrespective of any covenant of warranty, as it was held that the titles to donation land granted by the Commonwealth to soldiers of the Revolution prior to its acquisition by the State, were confirmed by the subsequent purchase by the latter. In this case there was of course no warranty of the title, and if there had been, it could not have been enforced against the State.

In a recent case,² *Burnside, J.*, in delivering the opinion of the Court said, "There is no principle in our law better or more plainly settled than that on which the Judge instructed the jury, that if a man sells and conveys land to which he has no right or title, and afterwards buys or acquires the title to the same land, he cannot claim it as against his grantee."³

In *Shaw v. Galbraith*,⁴ there was a conveyance to a grantee without the addition of the word *heirs*, but the covenant of warranty was made with him and his heirs, and *Rogers, J.*, who delivered the opinion of the Court, held that although it was a technical rule that a warranty could not enlarge an estate, yet it might operate by way of equitable rebutter to avoid circuity of action. "In this case, it matters but little whether the estoppel operates by the ordinary effect, whereby the parties are debarred from denying the passage of the estate, or as a transfer of the estate.

¹ 4 Watts & Serg. 161.

² *Root v. Crook*, 7 Barr, 380. In this case, the counsel for the plaintiff in error argued that there could be no estoppel without a warranty.

³ This is perfectly correct and in accordance with all the authorities. *Infra*, 347.

⁴ 7 Barr, 111.

On this point there is much learning in the books, somewhat difficult to understand, but which we are relieved from examining, as take it as you may, if an estoppel, it is an answer to the action of the grantor, or those claiming under him, even although the fee may not have been transferred so as to enable the grantor to support an action against a stranger." The principle of the cases which depend upon the presence of a warranty, seemed there to have been approved, and the learned Judge adds, "without then undertaking to determine whether the fee simple is transferred, we are of opinion that the grantor and the plaintiff who claims under him are estopped from denying the title."¹

As respects the law in England upon this subject at the present day, Sir E. Sugden remarks: "If a man sell an estate to which he has no title, and, after the conveyance, acquire the title, he will be compelled to convey it to the purchaser. But it seems to have been considered that this is a personal equity attaching on the conscience of the party, and not descending with the land; and, therefore, that if the vendor do not in his lifetime confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract. This opinion, however, deserves great consideration." *Morse v. Faulkner*,² is the authority cited, in which, however, Chief Baron Eyre spoke by no means positively as to this doctrine of mere personal equity, and expressly said, "I shall not determine the case upon this ground without further consideration." On the

¹ See accordingly *Doe v. Prestwidge*, 4 Maule & Sel. 178, where both the facts and the decision were to the same effect.

² 1 Anstruther, 11.

other hand, Vice Chancellor Leach went to the opposite extreme in *Bensley v. Burden*,¹ and treated an estoppel, caused by a deed of lease and release, as possessing the high efficacy of actually transferring the estate.

But the authority of this case was soon after indirectly, if not positively denied by the Court of King's Bench, in *Right v. Bucknell*;² and Sir E. Sugden, who had himself argued in favor of the estoppel in *Bensley v. Burden*, afterwards said, when Chancellor of Ireland,³ that it is now clearly settled that a con-

¹ 2 Sim. & Stuart, 524.

² 2 Barn. & Adolph. 273.

³ 4 Drury & Warren, 369; 2 Connor & Lawson, 599. The report in the first of these books is the more full. The Chancellor is there reported to have said, "This conveyance, being an innocent conveyance by lease and release, could not operate by way of estoppel. It is true that Sir John Leach, in *Bensley v. Burden*, 2 Sim. & Stu. 519, did hold the contrary, and decided that an estoppel could be worked by lease and release. The point was subsequently ruled the other way in the Court of King's Bench, in *Right v. Bucknell*, 2 Barn. & Adolph. 273, and it is now clearly settled, that a conveyance of this nature has no effect upon the legal estate, which the party subsequently acquires." In 2 Connor & Lawson, the report is, "Speaking from recollection, I think Sir John Leach decided in *Bensley v. Burden*, though I pressed him very much upon the point, that a lease and release would operate by estoppel, but the Court of King's Bench afterwards held otherwise, and the current of authorities has established the point." The Chancellor's recollection, however, was not exactly accurate as to his own position in the case of *Bensley v. Burden*, as he seems to have thought that Sir John Leach had held in favor of the estoppel, notwithstanding the pressing remarks in opposition to it. But, in fact, Sir E. Sugden argued in favor of the estoppel, and, it would seem, not very earnestly either, in the first argument, as the report of his argument is, "To the extent of securing the annuity, the deeds of 1803 operate by way of estoppel. But whatever be their operation at law, it is quite clear, that if a person assumes to sell an estate in which he has no interest, and he afterwards acquires an interest, this Court would, upon a bill being filed against him, compel him to execute a conveyance. And, it is equally clear, that a purchaser from him with notice would stand in the same situation as the vendor;" and the Vice-Chancellor, in delivering his opinion, said: "It is said that estoppel cannot be worked by lease and release, and, therefore, it was necessary to come into equity, and this point was treated at the bar as too clear for argument. My impression was

veyance of this nature has no effect upon the legal estate which the party subsequently acquires.

But, it may be asked, if a warranty does not of itself create an estoppel, and if an estoppel is not created by a deed taking effect under the statute of uses, how is an estoppel created, and what is the true principle that appears to be properly deducible from the many authorities cited? The answer to this question may perhaps be, that the principle of the cases seems to be referable to a familiar rule in equity, that if a man contracts for the sale of an estate, which he has not at the time such contract is entered into, and he afterwards acquires such an interest as will enable him to make good his contract, equity will compel him to perform it and make good the title. The presence of a warranty in a deed purporting to convey an estate, has, it would seem, upon strict principle, no greater effect than a solemn asseveration that the contract between the vendor and purchaser is, that that identical estate shall be actually transferred from the former to the latter; and such an effect can be produced by other covenants than those of warranty, and by other parts of the deed than the covenants. It is believed that many of the cases have acted upon this principle by holding that by a recital in some other part of the deed, the same effect will be produced as by a warranty;¹ and, by holding further, that when a warranty, however generally expressed, is limited and restrained by the context of the deed, no estoppel

otherwise, and I requested that the case might be argued a second time upon that point alone; and, after hearing that second argument, I am confirmed in my opinion, that estoppel is as well worked by an indenture of release as by any other indenture;" but, as has been stated in the text, this has since been overruled.

¹ *Supra* p. 322.

will be created., But whatever may be the means by which the effect is produced, it is submitted that the effect itself should not, at least upon strict principle, be that of an estoppel in its technical meaning. At all events, the cases in England at the present day establish, as was said by Sir E. Sugden in a recent case,² no more than this, "that if a man sells an estate, (and the principle is just the same, if he grants his lands in mortgage, or creates an annuity issuing out of them), and the title is afterwards defeated, but subsequently he acquires the same land under another title, there is an equity arising out of the contract to fasten it upon the new title."

It sometimes happens that a purchaser, in giving to his vendor a mortgage for the purchase money, is required to insert on it general covenants for title; and it has often been urged, that in the event of a failure of title or eviction of the mortgagor, he is estopped by these covenants from availing himself of any indemnity or relief to which he would otherwise be entitled by virtue of his vendor's covenants to himself. This doctrine is sought to be based upon the principle, that "estoppels should be reciprocal." Although the question was left undecided in a late case in Massachusetts,³ yet, in one still more recent,⁴ it

¹ *Supra* p. 326.

Jones v. Kearney, 4 Drury & Warren, 159. In England, at the present day, since fines have been abolished and feoffments shorn of their high efficacy, (statute of 8 & 9 Vict. c. 106), it may be said that the only cases in which after-acquired titles *actually pass* by a former conveyance, so as to exclude a subsequent purchaser, are those of leases. In conveyances of a freehold deriving their effect under the statute of uses, no such effect of estoppel occurs, as was expressly held in *Right v. Bucknell*.

³ *Fitch v. Seynour*, 9 Metc. 468.

⁴ *Summer v. Barnard*, 12 id. 461.

was held that the law of estoppel was inapplicable to such a case. The principle was stated with clearness in New Hampshire,¹ where, in a suit brought by a mortgagor upon covenants contained in a deed made to him on the same day by the mortgagee, Gilchrist, J., said: "The plaintiff's covenant is a direct allegation that there was no incumbrance when he made his deed, but it is no *admission* that there was no incumbrance when the defendant made *his* deed. How does the covenant estop him from showing that there was no incumbrance at the date of his own deed, in a suit against him on his covenant. The defendant's deed must have preceded the plaintiff's deed. A warranty of title by the plaintiff does not prove that the defendant had title when he conveyed, for the plaintiff might then, or immediately after, have purchased in an opposing title, or removed an incumbrance. The fact that the plaintiff had a title when he thus reconveyed, is perfectly consistent with the fact that the defendant had not a title when he conveyed to the plaintiff. Could it be said, if the defendants had mortgaged the land, and then conveyed to the plaintiff, who mortgaged to the defendant, and then the plaintiff had extinguished the first mortgage, that the plaintiffs should not recover of the defendants the sum he had thus paid, because his mortgage contained a covenant against incumbrances? True, he covenants against incumbrances, but it is against those of his own creation, and not such as the defendants may have charged upon the land." And the same view of the law has been taken in several other States.²

¹ Haynes v. Stevens, 11 New Hamp. 32.

² Hubbard v. Norton, 10 Connect. 434; Hardy v. Nelson, 27 Maine, 528; Kellogg v. Wood, 4 Paige, 614.

The question of how far a recital of title in a deed operates as an estoppel to the *grantor*, is one which has caused some variety of decision. But in a recent English case,¹ it seems to have been doubted whether, when a deed contained a recital of title, the *purchaser*, upon being evicted, was not estopped from denying the accuracy of such recital in an action on his covenants for title; such a doctrine, however, might operate with some injustice, and in a subsequent case² it was expressly denied. So, in a recent case in Mississippi,³ it was held, that a purchaser who had received a deed with covenant of warranty, excepting only the widow's right of dower, was not estopped for controverting the fact of the marriage.

The rule has already been adverted to which prevails in this country, as to the admission of evidence to show that the consideration of a purchase was in reality greater or less than that expressed in the deed. In this country such evidence is generally admissible; in England it is not. But the American rule has in a recent case in New Jersey⁴ been carried much farther than merely to sanction the admission of evidence to increase or diminish the consideration as to amount. The plaintiff conveyed land which he had previously mortgaged; and having, after the sale, discharged the incumbrance, sued the purchaser for its amount, on the ground that by an agreement between them, the latter expressly agreed to pay off the mortgage. It was urged for the defendant that the plaintiff was estopped by his covenant against

¹ *Young v. Raincock*, 7 Common Bench, 310.

² *Stronghill v. Buck*, 14 Jurist, 741.

³ *Stevenson's heirs v. M'Reany*, 12 Smedes & Marsh. 57.

⁴ *Bolles v. Beach*, 10 Amer. Law Journal, 124.

incumbrances from proving the existence of the mortgage, or that the defendant undertook to pay it; but the Court held, (the Chancellor and three justices dissenting,) that in the first place the evidence offered was merely to show the nature and extent of the payment of the consideration, and therefore came within the doctrine of the American authorities; and secondly, that the law of estoppel could not apply, as it was said that the question was one merely collateral to the deed, the action not being founded directly upon it.

But in Massachusetts the law was differently held in an early case, of great apparent hardship.¹ A testatrix sold land to one whom she afterwards appointed her executor, covenanting that she was lawfully seized, had good right to convey, and that the premises were free from incumbrances. The purchaser being evicted after her death, credited himself in the settlement of the estate with \$1000 as damages, arising from a breach of these covenants, and in reply to proof that he had himself formerly conveyed the same premises to the testatrix, with similar covenants, and that the adverse title was paramount to his own originally, and was covered by the covenants he gave, offered to prove that when he originally purchased it was merely as agent for the testatrix,—that the consideration was paid by her—that he bought in pursuance of an agreement with her, and conveyed to her without receiving any consideration whatever. It was, however, held by the Court, that “to admit the evidence offered would be to permit him directly to contradict his deed, in that he

¹ *Eveleth v. Crouch*, 15 Mass. 307.

declared himself to be the owner of the land, and to have lawful right to convey it, and his express and unequivocal covenants would be defeated by verbal declarations. If the appellant suffers, it is because he was incautious in the mode of conducting his business ;” and a similar rule has been also applied in New York.¹

¹ *Squire v. Harden*, 1 Paige, 495.

CHAPTER X.

IMPLIED COVENANTS, AND HOW COVENANTS FOR TITLE
MAY BE LIMITED OR QUALIFIED.

LONG before the introduction of deeds, the feudal system demanded that the vassal should pay homage to his lord for the fief received at his hands, and that the lord should protect the vassal in the enjoyment of his fief, or give him another in case of its loss. The earliest implied covenant for title was, then, this warranty, which was no more than an incident of the peculiar tenure by which lands were then held, and which was implied from homage.¹ When deeds became common, it is probable that long before the introduction of the express warranty by the word *warrantizo*, there was no other than the warranty implied by the word of feoffment, *dedi*. The effect of the statute *de bigamis*,² and of the statute of *quia emptores*,³ in restricting the warranty thus implied to the life of the donor, has already been referred to in the first chapter, and it was no doubt owing to this effect that the introduction of express warranties is to be attributed.⁴ The latter were termed warranties in deed,

¹ Fitz. Nat. Br. 311.² 4 Edw. I. c. 6.³ 18 Edw. I. c. 1.⁴ Indeed, says Blackstone, (2 Comm. 300,) "In other forms of alienation, gradually introduced since that statute (*quia emptores*,) no warranty whatsoever is implied; they bearing no sort of analogy to the original feudal

and those arising from implication, warranties in law.¹ The only other warranties arising by implication with respect to an estate of freehold, were those arising from a partition and exchange.²

The remedy upon an implied warranty of a freehold was the same as that upon an express warranty, viz.: by voucher and *warrantia chartæ*.³ The warranty, however, enduring (since the statutes *de bigamis* and *quia emptores*,) no longer than for the life of the warrantor, its burden did not of course descend upon his heir. The benefit of the warranty did however descend upon the heir of the warrantee if the latter died in the lifetime of his warrantor;⁴ and here there was a difference between the effect of the implied and that of the express warranty, since under

donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or warrant." So in the reign of Elizabeth it is said, "If a man make a feoffment in fee without warranty, the purchaser is entitled to the charters, etc., for as the *feoffor is not bound to warrant* the land he cannot be vouched." Co. Litt. 6a. Buckhurst's case, 1 Rep. 1. So that in a conveyance of the freehold there was at that time no warranty implied as a consequence of tenure, the only implied warranty being derived from the word *dedi*, and that was limited to the life of the grantor. No warranty of a freehold was implied from the word *concessi*. Co. Litt. 384a. Nokes' case, 4 Rep. 81, and see Mr. Butler's note, and from the cases cited from the Year Books in Spencer's case, 3 Coke, 10, it is probable that but for the statute *de bigamis*, which recognized and partially altered the common law signification given to *dedi*, its power of raising a warranty would gradually have been lost.

¹ Because in judgment of law they, (that is the words from which warranty is implied,) amount to a warranty without this verb *warrantizo*. Co. Litt. 384a.

² "This word *excambium*, doth imply a warranty." Co. Litt. 384. With respect to the warranty implied from a partition, it was, however, held in a very learned opinion by Kennedy, J., in *Weiser v. Weiser*, 5 Watts, 279, that a warranty was only implied in case of a partition between coparceners and not between tenants in common. 2 Roll. Abr. 739.

³ Fitzh. Nat. Brev. 312.

⁴ Co. Litt. 384a.

the latter, neither its burden or its benefit descended upon an heir unless expressly named.¹ But although the benefit of the implied warranty descended to an heir, it seems that it did not pass to an assignee; for in Spencer's case,² it was resolved that if a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; in other words the implied warranty did not run with the land.³

Both of these implied covenants were what is usually termed *general* covenants, that is, covenants against the acts of all persons claiming by title,⁴ as distinguished from covenants restricted to the acts of the covenantor and those claiming under him, which are usually termed *limited* covenants. But there was still this difference between them; the implied covenant in the case of a freehold was, during the lifetime of the feoffor, unrestrained by any express covenant which the deed might contain.⁵ The covenants, how-

¹ This must not be thought to be in conflict with an equally true position, viz: "that though in the clause of warranty it be not mentioned to whom, yet shall it be intended to the feoffee." Co. Litt. 383 b.; *Herrin v. McIntyre*, 1 Hawks, 410. The benefit of the warranty enured to the person to whom the land was conveyed, but not to his heir, unless the latter was named. Soon after this, Coke says, "If a man doth warrant land to another without this word (heirs), his heirs shall not vouch." Co. Litt. 384 b.

² 3 Coke, 16, 4th resolution.

³ There was another case of implied warranty in respect to a freehold—as where "if a man make a gift in tail or a lease for life of land by deed or without deed, reserving a rent or of a rent service by deed, this was a warranty in law," which extended both to the heirs of the grantor and to the assignees of the reversion, and whose benefit enured also to the assignees of the grantee. Co. Litt. 384 b.

⁴ Touchs. 166–7.

⁵ "For if a man make a feoffment in deed by *dedi*, and in the deed doth warrant the land against J S and his heirs, yet *dedi* is a general warranty during the life of the feoffor;" Co. Litt. 384; and so says Coke, in *Nokes' case*, "I heard the Lord Dyer, and the whole Court of C. P. Hil. 14 Reg.

ever, implied by the words demise and grant, fell within the maxim *expressum facit cessari tacitum*, and were modified or restrained by express covenants. Thus, where in Nokes' case,¹ the lessor, after employing the words demise and grant, which imported a general warranty, added a covenant for quiet enjoyment, "without eviction by the lessor, or *any claiming under him*," it was held that the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, and this has since been recognized as settled law.²

Owing to a misapprehension of one or two older cases, the dangerous doctrine has more than once been broached, that a covenant for title may be implied from a recital. In the early case of *Severn v. Clerk*³ in an action of debt on a bond conditioned to perform certain articles contained in a deed whereby the obligor had assigned a term of years, reciting that he was possessed of them, it was held, that if the party had not that interest by a good and lawful conveyance, his obligation was forfeited. But it was

Eliz. resolve, that if a man make a feoffment by this word *dedi*, and with express warranty in the deed, he may use the one or the other at his election." So in *Littleton's Rep.* 64; 1 *Bulstrode*, 3; *Butler's note to Co. Litt.* 384 a.

¹ 4 *Rep.* 81.

² *Merrill v. Frame*, 4 *Taunt.* 329; *Frontin v. Small*, 2 *Raym.* 1419; *Line v. Stephenson*, 5 *Bing. N. C.* The application of this to the express and implied covenants for title in a lease is, that when a covenantor means to limit his liability by binding himself to protect the tenant only against disturbances or defects of title, arising from the lessor's own acts, and the acts of those who represent him or claim under him, and employs a special covenant for this purpose, the law will not render it useless, and defeat his intention by overriding it with the more enlarged general covenant, which the law otherwise implies from the very words of leasing. *Deering v. Farington*, 1 *Mod.* 113; *Merrill v. Frame*, 4 *Taunt.* 328.

³ 1 *Leo.* 122.

said that the recital of itself was nothing, but being joined and considered with the rest of the deed, it was material. It has, however, been chiefly owing to the misapprehension¹ of the case of *Johnson v. Proctor*,² that such an opinion has been entertained as to the effect of a recital. In that case, A and B being joint tenants for years of a mill, A assigned all his interest to C, without the assent of B, and died. B afterwards, by indenture reciting the lease and that it came to him by survivorship, granted the residue of the term to J. S., and covenanted for quiet enjoyment, notwithstanding any act done by him. He also gave the purchaser a bond conditioned to perform the covenants, grants, articles and agreements in the assignment; and the purchaser, having been evicted by C of the moiety assigned to him, brought an action on the bond, and judgment was given in his favor. Lord Eldon seemed to consider the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the decision seems to have turned upon the word *grant*, and not at all upon the recital, and Sir E. Sugden, in noticing this case,³ says: "It seems material to refer the case of *Johnson v. Proctor* to the true ground of the decision, because, if the case turned solely on the recital, it might, perhaps, be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seized in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title—

¹ In *Browning v. Wright*, 2 Bos. & Pull. 13, per Lord Eldon, then Chief Justice of the Common Pleas.

² *Yelverton*, 175; 1 *Bulstrode*, 3.

³ 2 *Vendors*, 524.

a proposition which certainly cannot be supported." Huston, J., took up the same misapprehension in *Christine v. Gotwalt*,¹ where he held that a recital, "being part of fifty-eight acres which A B granted," amounted to a covenant for seizin, a decision from which Gibson, C. J., strongly dissented at the time, and which, when the same case came up again, some years after,² was overruled in a very accurate and lucid opinion by Mr. Justice Kennedy. In a late case,³ it was correctly said, that "a grantor, and in some instances, even strangers,⁴ may be estopped by mere recitals in a deed, and yet it does not follow that such recitals are covenants, either express or implied."

It has often been made a question, how far covenants for title can be extended so as to imply a covenant that the premises actually correspond with the description of them in the deed; in other words, whether a covenant for title implies a covenant for quantity, or, more properly speaking, whether the affirmation of quantity amounts to a covenant, or is mere matter of description. As a general principle it does not. *Snow v. Chapman*⁵ seems to be the earliest case as to this point, on this side of the Atlantic, where, upon a conveyance of one hundred and ten acres, which were particularly described, it was briefly held by the Supreme Court of Connecticut, that no action would lie upon the covenant for seizin because of the actual quantity being but ninety acres. This was followed in New York by *Jackson v. Defendant*,⁶ and *Mann & Toles v. Pearson*,⁷ where Spencer,

¹ 16 Sergt. & Rawle, 112. ² *Whitehill v. Gotwalt*, 3 Penna. Rep. 327.

³ *Ferguson v. Dent*, 8 Missouri, 673.

⁴ *Carver v. Jackson*, 4 Peter's C. C. Rep. 1.

⁶ 1 Caines, 493.

⁵ 1 Root, 528.

⁷ 2 John 40.

J., in delivering the opinion of the Court,¹ said: "The enumeration of quantity is not of the essence of the contract; it is matter of description merely. . . . It is settled,² that if one lease all the meadows in D and S, containing ten acres, and they contain twenty, all shall pass. If then the grantors would take, in case the lot contained more than the quantity mentioned, and where the words more or less do not occur, it would seem unreasonable that the grantor should be made responsible when the quantity was less; upon this notion there would then be no reciprocity. The grantee might get more, but never less than the quantity mentioned." And the principle of these cases has been frequently recognized and applied.³

It has been said by very distinguished legal authority, that in the creation of a freehold there were other words besides those already mentioned, which implied a warranty. In the year 1741 Lord Hardwicke is reported to have said:⁴ "When a man has granted and conveyed, be the right real or pretended, the very words, grant and convey, imply a warranty and a covenant for quiet enjoyment;" which was followed in 1748 by the following expression by the same distinguished judge: "But it is said the word *grant* of itself imports a covenant, which it does at law, but that is where there is no particular cove-

¹ Tompkins, J., and Kent, Ch. J., concurring. ² 13 Vin. Abr. 79 pl. 24.

³ From this opinion Thompson and Livingston, J. S., strongly dissented.

Jackson v. Barringer, 15 Johns. 471; Jackson v. M'Connell, 19 Wendell, 175; See the very recent case of Roat v. Puff, 3 Barbour's S. C. R. 358, where the authorities are reviewed; Jackson v. Moore, 6 Connec. 717; Belden v. Seymour, 8 Connec. 191, (Bissell, J., dissenting), Benedict v. Gaylord, 11 Connec. 332; Smith v. Dodge, 2 N. Hamp. 303; Large v. Penn, 6 Serg. & Rawle, 488; Howell v. Barr, 2 Mass. 380; Powell v. Clarke, 5 Mass. 355.

⁴ Mann v. Ward, 2 Atkins, 238.

nant, which there is here."¹ Lord Eldon, moreover, when Chief Justice of the Common Pleas, said: "Now these words, granted, bargained, sold, enfeoffed, and confirmed, certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture."²

The precise point came before Mr. Chief Justice Kent, in the year 1804,³ when it was examined with his usual research and explained with his usual clearness, and it was conclusively shown that the words, grant, bargain, sell, alien and confirm, imply no warranty whatever by the common law in the creation of a freehold, a warranty being implied only from

¹ Clark v. Sampson, 1 Vez. Sr. 100.

² Browning v. Wright, 2 Bos. & Pull. 13. Buller, J., added, "According to the ancient mode of conveyance, deeds were confined to a very narrow compass. The words grant and enfeoff amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, are intended for the protection of the party conveying, and are introduced for the purpose of qualifying the general warranty, which the old common law implied;" and this, he added, has been settled since Nokes' case.

Of these expressions, it should be observed, all were *dicta*—none of them were essential to the case before the Court, and no authority whatever was cited in support of them, except by Mr. Justice Buller. But Nokes' case was not a conveyance of a freehold, but "a demise of a term;" and when it is there said, that "for this covenant in law upon these words, demise, grant, &c., the assignee shall have a writ of covenant," this applied only to the case of a lease. The question whether the words grant and enfeoff created either a covenant or a warranty in the case of a freehold, was presented in Brown v. Haywood, 3 Keb. 817; S. C. Freeman, 414, and decided in the negative; and in Spencer's case, 3 Coke's, 16, "it was resolved by Wray, Chief Justice, and the whole Court, that this word (*concessi* or *demisi*), in case of a freehold of inheritance, does not import any warranty." See also Vin. Abr. "Covenant," c. 19.

Mr. Evans, in a note to Stat. 4 Ed. I., (1 Coll. of Statutes, 192,) observes, "that it is singular that a Judge of such eminence as Mr. J. Buller should have stated that the words grant and enfeoff amount to a general warranty in law, and have the same force and effect, and should refer to Nokes' case as settling that point, as Nokes' case relates to the demise of a term, in which the words demise and grant operate as a covenant."

³ Frost v. Raymond, 2 Caines' R. 188.

the word *do* or *dedi*. After referring to the warranty implied by the word *grant* in case of a leasehold, the learned Chief Justice remarks: "We are not able to assign a very solid reason for this distinction between the force and effect of the words "give" and "grant." It arose from artificial reasons derived from the feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words, or change their established operation. The other words in the deed, "bargain, sell, alien and confirm," have never been considered as implying any covenant whatever in any case.¹ The only dictum that appears to oppose the law as now laid down, is that of Lord Eldon, in the case of *Browning v. Wright*."²

Upon the whole view of the law, it may then be safely said that in the creation or transfer of an estate of freehold, no covenant for title is implied at the present day by the common law, unless perhaps where the word "give" may happen to be employed,³ and it may be doubted whether such an effect would be given even to this word.

¹ The dictum of Lord Eldon, in *Browning v. Wright*, was directly approved by Huston, J., in *Christine v. Whitehill*, 16 Serg. & Rawle, 111; but the case was decided by a bare majority of the Court, Gibson, C. J., dissenting, and was overruled when it came again before the Supreme Court, in an able opinion by Kennedy, J. (*Whitehill v. Gotwalt*, 3 Penna. R. 326.)

² This was approved in *Young v. Hargrave's Administrator*, 7 Ohio, (Part 2), 63; *Pringle v. Sturgeon*, 6 Littel, 112; *Black v. Gilmore*, 9 Leigh, 449; and *Gee v. Pharr*, 5 Ala. 588; and the cases of *Allen v. Sayward*, 5 Greenl. 230; *Pickets v. Dickens*, 1 Murphy, 346; and *Deakins v. Hollis*, 7 Gill & Johns. 311, not only deny an implied warranty to any other words than *dedi*, but hold that since the statute of uses, even that word implies no warranty, in conveyances taking effect under that statute. In *Roebuck v. Dupuy*, 2 Ala. 538, this last question was left undecided.

³ By the recent English Statutes, 8 & 9 Vict. c. 106, § 4, it is declared "that the word 'give' or the word 'grant' in a deed executed after the first

On the creation of an estate less than freehold, however, a covenant for title was from an early period implied from the words of leasing,¹ and such is still the rule at the present day.²

Such a covenant had a two-fold operation—it was at the same time a covenant for quiet enjoyment, and a covenant that the lessor *had the power to demise*.³

day of October, 1845, shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of an Act of Parliament, imply a covenant.

¹ Such as *demisi, concessi*, "or the like;" Brooke's Abr. Covenant, pl. 32; Spencer's case, 3 Coke, 16; Nokes' case, 4 id. 81; Cro. Jac. 73; Touchs. 160-165.

² *Mervill v. Frame*, 4 Taunton, 329; *Williams v. Burrell*, 1 Com. Bench, 402; *Frost v. Raymond*, 2 Caines, 194; *Grannis v. Clark*, 8 Cowen, 36; *Barney v. Keith*, 4 Wendell, 502; *Tone v. Brace*, 11 Paige, 569; *Sumner v. Williams*, 8 Mass. 201; *Waldo v. Hall*, 14 Mass. 486. The New York Revised Statutes, (Part II. c. 1. Art. 4. § 140,) declared that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not," which in *Kinney v. Watts*, 14 Wend. 39, was held (Sutherland, J.,) to extend to leases, but in *Tone v. Brace*, when before the Vice Chancellor, (1 Clark's Ch. Rep. 569,) this was denied, and the statute was held not to extend to leases, they not being "conveyances of real estate," within the meaning of the statutes, and this, on appeal, was affirmed by the Chancellor, 11 Paige Ch. 269.

It has been recently denied in New Hampshire, that any such effect can be implied from the words "let and lease;" *Levering v. Levering*, 13 New Hamp. 517, and see the doubt thrown out by Cresswell, J., in *Messent v. Reynolds*, 3 Com. Bench, 203, and the decision is sought to be based upon the absence of these words in the older authorities. The only difference would seem to be that they use the Latin word *demisi*, of which "lease" seems certainly a fair translation, and apart from this, the cases use the expressions "grant, demise," etc. or "grant, demise, or the like," which would seem to infer that they meant a covenant to be implied from any words of leasing, and from the peculiar relation of landlord and tenant, this seems no more than reasonable, especially since in later times the rule has grown up that the tenant may not deny his landlord's title. At the present day it has been at least doubted in England whether any such covenant arises by implication of law from the simple relation of landlord and tenant. *Granger v. Collins*, 6 Mees. & Welsb. 460; *Messent v. Reynolds*, 3 C. B. 194.

³ *Holden v. Taylor*, Hob. 12; *Cloake v. Harper*, Freem. 121; Note to 1

The covenant implied from the words of leasing, differed from that implied from *dedi* both as to source and effect. The former arose from contract—the latter from tenure. The warranty was a real covenant in its strict sense, while on the former the tenant recovered damages as a recompense for the term lost, and not another term in its place. But there was also this similarity; the covenant implied from the words of leasing, like that arising from *dedi*, has long since been held to last no longer than during the life

Saunders, 329; Frazer v. Skey, 2 Chitty, 646; Line v. Stevenson, 5 Blng. N. C. 183; Burnitt v. Lynch, 5 Barn. & Cress. 609; per Littledale, J.; Grannis v. Clark, 8 Cowen, 36; Cranch v. Fowle, 9 New Hamp. 219.

On the other hand, the words "yielding and paying," implied also a covenant on the part of the lessee to pay the rent reserved. Butler's note to Co. Litt. 384 a. Bac. Abr. Covenant B. Royer v. Ake, 3 Penna Rep. 466. Some old authorities are to be found which decide that these words have a still greater signification, and that they make an express covenant. (Hellier v. Gaspard, Siderfin, 266; Tilden v. Walter, id. 447; Newton v. Osborne, Styles, 387, id. 406–481,) but even at that day the authority of these cases was not uncontradicted. (Anon, 1 Sid. 447; 1 Saund. 241, note; Harper v. Bingham, 2 Lev. 206,) and in later times it seems to have been thought that the covenant thus created is not express, but implied; Webb v. Russell, 3 Term Rep. 402; Mills v. Auriol, 4 id. 98; Vyvyan v. Arthur, 1 Barn. & Cress. 416; Iggulden v. May, 9 Vez. 330; Church v. Brown, 15 Vez. 264; Kunckle v. Wynick, 1 Dall. 307; Kimpton v. Walker, 9 Vermont, 191. This question has practically some importance, as, if the covenant is to be deemed an express one, the lessee is still bound to his lessor for the rent, notwithstanding an assignment of the term, and acceptance of the rent by the lessor from the assignee; (Mills v. Auriol) while if the covenant is merely implied, the liability for rent is but co-extensive with the occupation, and the lessee is not liable for the rent accruing after his assignment to another, and the acceptance of the rent by his lessor from the latter.

The remarks of Mr. Baron Platt in his work on Covenants, as to the remedy on this implied covenant when the lease is by *deed poll*, are well worthy of attention; and in accordance with the view there taken, it has been held in Pennsylvania and North Carolina, that covenant will not lie against a grantee by deed poll. Maule v. Weaver, 7 Barr, 329; Benbury v. Benbury, 2 Dev. & Bat. 239.

of the lessor.¹ So that if a tenant for life make a lease for years and die before its expiration, and the remainder man evict the lessee, no action on the implied covenant will lie against the executor of the lessor.² The implied covenant is therefore in this respect more restricted than the express covenant for quiet enjoyment.³

¹ *Bragg v. Wiseman*, 1 Brownl. 22; Touchs. 178.

² *Adams v. Gibney*, 6 Bing. 656.

³ The proper distinction between an express and an implied covenant was very recently laid down with great clearness in the case of *Williams v. Burrell*, 1 Common Bench Rep. 402. A lease which was invalid by reason of an excessive execution of a power, contained a clause that the said lessor "for himself, his heirs, and assigns, the said demised premises, etc., against himself and all other persons, etc., shall and will during the said term warrant and defend." On the death of the lessor, who was but tenant for life, the lessees were evicted by the remainder man, and brought covenant against the executors of the lessor, who contended that this clause was not an express but an implied covenant, so as to bring the case within the rule that upon implied covenants broken after the covenantor's death, his executor is not liable, and Tindal, Ch. J., held the following language; "It was admitted, on the argument before us, both on the point of the plaintiff and the defendant, that the clause above set forth, being found in a demise not of a freehold interest, but of a term for years only, was not strictly and properly a warranty. Indeed, all the authorities agree upon the point, that the warranty in such case can neither vouch nor bring *warrantia chartæ* nor use it by way of rebutter, the ordinary modes by which a warranty is made available when annexed to an estate of freehold or inheritance, Co. Litt. 389 a; Hob. 3. It was also admitted on the part of the defendants that although such clause of warranty, when annexed to the demise of a chattel interest, was not strictly and properly a warranty, yet that it amounted to a covenant in law for quiet enjoyment; but it was at the same time contended by them that it amounted to a covenant in law only; and that, being a covenant in law, it would extend no further than to protect the estate which the lessor could lawfully grant, that is, in this case, a term of years determinable with his own life; whereas, on the part of the plaintiff, it was insisted that the clause in question amounted to an express covenant for quiet enjoyment, and that, being an express covenant, it extended to protect the whole term which was purported to be granted by the lease. And, after hearing the argument, we are of opinion that the construction contended for on the part of the plaintiff, is the just and proper construction, and that the clause now under consideration operates as a covenant for quiet enjoyment during the whole of the term granted by the lease. For, looking at the words of the war-

But it has, in another respect, a greater scope, since an eviction is not necessary to a breach of an implied

ranty, we hold that they do, in their plain and literal meaning, import an agreement on the part of the lessor that the lessee shall enjoy the land demised during the term mentioned in the lease; and that such words do consequently amount to an express covenant to that effect, upon the principle laid down by Chief Baron Comyns, in his Digest, tit. Covenant, (A. 2) "That any words in a deed which show an agreement to do a thing, make a covenant."

The distinction between covenants, and the only distinction, (so far as relates to the present inquiry,) we take to be this, they are either covenants by express words or covenants in law. "There are two kinds of covenants," says Lord Coke, Co. Litt. 139 b, "viz. a covenant in deed and a covenant in law;" or as it is put in Vaughan's Reports, page 118.—"All covenants between a lessor and his lessee are either covenants in law, or express covenants." And that the covenant now before us does not fall within the class of covenants in law, is clear from considering the nature of such covenants. A covenant in law properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate, so by those words already created; as, if a man by deed demise land for years, covenant lies upon the word "*demise*," which imports, or makes a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word "*dedi*." But the argument in the present case is not founded on the legal effect or consequence of any words of demise, but on that which is alleged to be the necessary construction of the words employed in the express clause of warranty. The covenant, therefore, has not any of the properties or the character of a covenant in law.

The argument on the part of the defendants has proceeded, throughout, on the ground, that, as the clause in the lease is not in its form and terms an express covenant for quiet enjoyment, but as such covenant can only be gathered and collected from the clause of warranty, so it must of necessity be ranked amongst implied covenants; and that, being an implied covenant only, it must be considered as a covenant in law; as if there were some rule or principle, that all implied covenants were covenants in law. But we think there is fallacy in this argument, from the use of the term "implied covenant," in a sense which does not properly belong to it. In every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily discovered; in others it is expressed with more obscurity, and discovered with a greater difficulty. In some cases, it is discovered from one single clause; in others it is only to be made out by the comparison of different and perhaps distant

covenant in a lease, the word demise, or grant, implying, as we have seen, not only a covenant for quiet enjoyment, but also *a power* to demise, which would therefore sometimes avoid many of the perplexing questions which present themselves under the former covenant as to what constitutes an eviction, since the lessee may, at his option, sue at any time, the covenant being broken as soon as it is made. It might be doubtful whether the American courts would, on this ground, deny to an assignee of the land, the right to take advantage of the implied covenant.¹

In this relation may be considered one of the most important and at the same time difficult questions

parts of the same instrument. But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is, whether it be in express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant. Now it is in this sense that the counsel on the part of the defendants appear to have used the term "implied covenants." The covenant for quiet enjoyment, they contend, is an implied covenant, because it is found in the deed in the form of a warranty, and not in that of an express covenant for quiet enjoyment; and they then further contend, that, being an implied covenant it must of necessity be a covenant in law. To which it appears to us to be a sufficient answer that an implied covenant, in the sense in which the phrase is used in the argument, is to all intents and purposes the same as an express covenant; and that it is only those covenants which the law itself implies, that can be properly considered as covenants in law—a character and description which, as we have already seen, does not belong to the covenant now under discussion. And upon considering the several authorities referred to, they will be found in accordance with this view of the case." See *Swan v. Stransham*, Dyer, 257 a; *Pincumbe v. Rudge*, Hobart, 3; *Wotten v. Hele*, 2 Saunders, 177; *Stewart v. Wolveridge*, 9 Bing. 60, reversed in error, 3 Mo. & Scott, 361; *Saltoun v. Houston*, 1 Bing. 443; 3 Swanst. 647.

¹ See *supra*, p. 285, *et seq.*

connected with the law of covenants for title, which is, how far these covenants (whether express or implied) may be limited or enlarged by the operation of other covenants contained in the same conveyance, and the subject is here introduced because in many States such questions have arisen between the different covenants implied by local statutes — between express covenants—and sometimes between express and implied covenants. Before referring then to these local statutes, it has been thought better to advert to the decisions that have arisen as to express covenants, and then apply them to those arising by implication. Such an arrangement will, it is hoped, avoid repetition.

It has been observed, that covenants for title are either general, (or, as they are often called, absolute), that is, covenants against the acts of all persons whomsoever claiming by title; or they are limited, (or, as they are sometimes termed in this country, special), that is, covenants extending only and restrained to the acts of the covenantor, or some other particularly named person;¹ where the latter covenants are those employed, they are not broken by a defect of title caused by any other persons than those thus named. But it sometimes happens that, through accident, inattention, or carelessness, one or more limited covenants are to be found with one or

¹ The form by which the covenants are thus restricted, is given *supra*, in the chapters treating of the respective covenants. Sir E. Sugden observes of these forms, that, "although this is the usual and technical manner of restraining covenants, yet an agreement in any part of a deed, that the covenantors shall be restrained to the acts of particular covenants will be good, notwithstanding that the covenants themselves are general and unlimited." 2 Vend. 524, citing *Brown v. Brown*, 1 Lev. 57.

more general covenants in the same conveyance, and hence arises the apparent contradiction of a vendor being only willing to covenant against his own acts, while at the same time he covenants against those of all other persons. Whether the general covenants are to enlarge those which are limited, or whether they are to be restrained by them, is, then, when they are incapable of being reconciled with each other, a question of considerable perplexity and importance.¹

It has been said by Lord Alvanley,² "however general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred, that the party could not have intended to use the words in the general sense which they import, the courts will limit the operation of the general words."

It may be observed, however, that it will be found impossible to lay down one fixed and uniform rule, comprising all the cases which may arise, more definite and precise than this. It is always a question of intention, of which these covenants are no more than the expression; and the contrariety which the cases present, arises not only from the ordinary difficulty of ascertaining the intention, but also from the application of the maxim, *verba cartarum fortius accipiuntur contra proferentem*.

Sir Edward Sugden considers³ that four propositions can be deduced from the authorities, viz. :

¹ "Every case must depend upon the particular words used in the instrument before the Court, and the distinctions will be found to be very nice and difficult." Note to 1 Saunders, 59.

² *Hesse v. Stevenson*, 3 Bos. & Pul. 575.

³ 2 Vend. 527.

1. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

2. Where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant; unless an express intention to do so appear, or the covenants be inconsistent.

3. As, on the one hand, a subsequent limited covenant does not restrain a preceding general one, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant.

4. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others.¹

¹ Mr. Platt has arranged the cases under two heads: 1. Cases in which words of qualification in the first part of a deed will apply to and limit covenants, in general terms, in a subsequent part of the deed; and 2, cases in which a qualification in the latter part of the instrument will narrow a preceding covenant expressed in general language. Platt on Covenants, 358. Many of the cases, however, cited by Mr. Platt under the second head, are placed by Sir E. Sugden under the first. Mr. Dart, in his late Treatise on Vendors and Purchasers, 372, in quoting the above classification of Sir E. Sugden, observes, "Of the above propositions, the first, if read in connection with the above classification of the covenants, and of their separate objects, seems to be warranted by the authorities; the second proposition, (which together, or rather as connected with the first, is disputed by the learned Editor, Mr. Sweet, of Mr. Jarman's work on Conveyancing), is, perhaps, hardly accurate; for although a prior general covenant will not, it appears, be restrained by a subsequent limited covenant having a different object, yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first; the third and fourth propositions seem to be unimpeachable." The tendency in Mr. Dart's work to criticise the older treatise will be observed by every student. It may be proper here to notice that some of the authorities do not appear to take any distinction between cases where a general or unlimited covenant *precedes* a special or limited one, and where it *follows* it; in other words, the mere priority of position in the conveyance, of one over the other, seems very often to be thought a matter of little or no moment. Thus, in *Iggulden v. May*, 9 Vez. 325, it is said the exposition must be both *ex antecedentibus et ex*

The case of *Browning v. Wright*¹ is constantly quoted as a leading authority upon the subject of one covenant being restrained by another, and has been generally classed under the first of these heads. In that case there was, in a deed purporting to convey an estate of fee simple, first a warranty² by the covenantor against himself and his heirs, followed by a covenant that, notwithstanding any act done by him, he was seized, &c., without any manner of condition or restraint to alter or defeat the estate granted, "*and that he had good right, full power, &c., to convey the same, &c., in manner aforesaid.*" Then followed limited covenants for quiet enjoyment and for further assurance. The covenantee was evicted³ by a title not within the limited

consequentibus, and in a note to *Gainsford v. Griffith*, 1 Saund. 60 a, where some distinctions are taken with respect to this matter of priority, Sergeant Williams observes: "It is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far would it now be adopted and no further. The proper rule seems to be that which Lord Mansfield laid down in a case, where the question was, whether certain words in a covenant amounted to a condition precedent or not, 'that the dependence or independence of covenants was to be collected from the sense and meaning of the parties, and that however transposed this might be in a deed, their precedence must depend on the order of time in which the intent of the transaction requires their performance.'" *Kingston v. Preston*, cited in *Jones v. Barkley*, Douglass, 684. So, per Dallas, Ch. J., in *Forod v. Wilson*, 8 Taunt. 543.

I had attempted a different classification of the cases from that adopted by the learned authors referred to, but finding it also prove unsatisfactory, have, for the most part, adhered to the arrangement of Sir E. Sugden.

¹ 2 Bos. & Pull. 13.

² Expressed as in *Williams v. Burrell*, *supra*, p. 364, note.

³ It was a constructive eviction. The covenantee became a tenant under the superior title. The reporters doubt, in a note to the case, whether this would be an eviction. But see *supra*, page 210, *et seq.*

covenants, and on a demurrer to his declaration it was argued on his behalf, that to adopt the rule contended for by the defendant, that the restriction of the prior special covenants must be engrafted on the subsequent general one, would be to establish the doctrine, that whenever a special covenant was inserted, all general covenants must be restrained thereby. It was, however, said by the Court, that if the doctrine did indeed necessarily follow, the demurrer could not be sustained, but the question was not whether a special covenant will restrain a general one, but whether the particular covenant on which the action was brought was general or special; "And my opinion," said Lord Eldon, then Chief Justice of the Common Pleas, (after premising that, in conveyances of a fee-simple estate, the purchaser was, according to the general practice, entitled to limited covenants only,) "upon considering the whole deed, is, that it is a special one. What would be the use of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantee were at liberty to say, 'I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all.' It appears to me, from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words,

‘in manner aforesaid, namely, for, and notwithstanding any thing by him done to the contrary.’”¹

¹ Buller, J., added, “I am inclined to think that the person who drew this deed intended that the two clauses should form but one covenant, but that not having strength of mind sufficient to carry him through one continued sentence of so great a length, he stopped, and introduced the words, ‘And that,’ which have created all the difficulty. Strike out these words, and the case is as clear as the sun. The covenant would then stand thus, the grantor covenants that, notwithstanding any act done by him, he is seized of the estate, and hath good title to convey. The two clauses are synonymous.”

In the early case of *Nervin v. Munns*, 3 Lev. 46, the vendor covenanted that, notwithstanding any act done by him to the contrary, he was seized in fee—that he had good right to convey—that the lands were clear of all incumbrances made by him, his father or grandfather, and that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather; and it was held that the second covenant, though general, was restrained by the first, to acts done by the vendor.

So, in a recent case before the Irish Court of Chancery, *Martyn v. M'Namara*, 4 Drury & Warren, 425, certain fee-simple estates and also lands held under leases for life, renewable forever, were conveyed to trustees under a marriage settlement with a covenant by the settlor with the lady's father, that the property was of a given value, followed by a general covenant for good title, and then a particular covenant by the settlor during his life to renew these leases; then succeeded limited covenants for quiet enjoyment and for further assurance. “The first and third of these covenants,” said Sir Edward Sugden, Chancellor, “are limited; the first relating to value, and the third to acts to be done by the covenantor during his own life, but the second covenant for good title considered by itself, would appear to be general, and the question would be whether, looking at the rest of the deed, at the subsequent covenants for title by the settlor and his son, the covenants for quiet enjoyment and for further assurance, which are strictly limited to the acts of the covenanting parties themselves, and those claiming under them, it would not be inconsistent with the general tenor of the deed to hold that this second covenant should be construed as unlimited, so as to bind the parties in an absolute and unrestricted manner. The subsequent covenants are not covenants by wholly different persons, but covenants by the former covenantor and an additional person. It would be absurd for a party in the same deed, in relation to the same property, to enter into the usual limited covenants, and yet bind himself absolutely to pay damages in case the title to the lands should from any cause prove defective, and that, not to the party who would be the proper hand to receive the money for the benefit of the wife and issue of the marriage. . . . The settlor meant to covenant only for what he had, for what might be in his power to settle.” It should be observed, however, that these remarks did not form any part

An early case in New York¹ was somewhat similar to *Browning v. Wright*. An undivided moiety of land was conveyed, "containing by estimation six hundred acres, and the same is hereby covenanted and warranted to contain at least five hundred acres." There was a limited covenant that in case of eviction from all or any part of the granted premises, the grantor should not only refund a proportional part of the consideration money, but should pay the value of the improvements, etc. Then followed a covenant for seizin and right to convey "in manner and form aforesaid." "There were also," the report says, "covenants for quiet enjoyment, against incumbrances, for further assurance and a warranty," but whether these were general or limited is not mentioned. In the course of the prior conveyances from the original patentee to the defendant, there had been some reservations of certain parcels of the land, amounting altogether to several hundred acres, and although the plaintiff had actually received under his deed from the defendant over seven hundred acres exclusive of these reservations, he contended that the covenant for seizin, being general, was broken as to these parts; that by warranting that there should be five hundred acres at least, the inference was that there might be more, and if more, that the covenants were to extend to it. The principle has been repeatedly settled, that covenants for title shall not extend to the *quantity* of land conveyed, unless such clearly appear to be the intention, and it is difficult to perceive how there could, on this ground, have been a doubt as to the

of the decision, the Chancellor saying expressly, "I am not now to decide the question as to the legal extent of this covenant."

¹ *Whallon v. Kauffman*, 19 Johns. 97.

decision. The case was, however, considered by the Court without reference to this principle, and it was held that the first warranty being only to the extent of five hundred acres, the other covenants went no further—the words “in manner and form aforesaid,” being sufficient to connect them with this limited covenant.¹

Browning v. Wright was followed in England by *Foord v. Wilson*,² where the assignor of a term for years covenanted that he had done no act to incumber—that notwithstanding any such act the lease was a good and subsisting one, and that he had good right to assign in manner aforesaid. Notwithstanding it was urged, with plausibility, that in the conveyance of a leasehold estate, where the title could not be so easily examined as in the case of a freehold, the purchaser must expect greater security from the covenants, it was clearly held by the Court that the intention of the parties was too plain to be gotten over; that the words “and that” connected the general covenant with the preceding limited one, and that the case was not distinguishable from *Browning v. Wright*, the only difference being as to the nature of the estate transferred.

*Stannard v. Forbes*³ was a stronger case than these. The vendor of a leasehold depending upon a life,

¹ *Davis v. Lyman*, 6 Connecticut, 252, was a very clear case. In a conveyance of a fee simple, the vendor covenanted that he had done no act to affect the title, and that the premises were clear of all mortgages, judgments or liens of the said parties of the first part of any nature or kind whatsoever, followed by a limited covenant of warranty; and it was held that all the covenants were limited, which was unquestionably correct, not only on account of the intimate connection between the first and second covenant, but from the words themselves of the second covenant.

² 8 Taunton, 543, S. C.; 2 J. B. Moore, 592.

³ 6 Ad. & Ell. 572, 634, S. C. 1 Nev. & Perry, 633.

covenanted that notwithstanding any act done by him, the lease was valid, and that the same and the term therein expressed was in full force, and in no wise determined otherwise than by effluxion of time; and also that notwithstanding any such act the vendor had full power to sell for the residue unexpired by effluxion of time; then followed limited covenants for quiet enjoyment and for further assurance. The life on which the lease depended had dropped before this assignment, and the covenantee was evicted by the remainder man. It was urged for the plaintiff that the words in the second covenant, "otherwise than by effluxion of time," rendered the idea of its restriction nonsensical, as effluxion of time could have been no act of the covenantor, but it was nevertheless held by Lord Denman,¹ that these words were

¹ "In performing this task on any particular occasion," said the Chief Justice with great truth, "we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respects from all others, and must be interpreted according to its own language. It should seem that the true grammatical sense of the words employed, when that can be ascertained, must prevail; and no case can be quoted in which our Courts have thought themselves at liberty to act in direct contravention of it. Such a course might indeed become necessary, for a deed may contain repugnant clauses; where these occur, the authorities fully warrant us in comparing the clause under immediate consideration with all which precedes and follows it, even though not forming parts of the same sentence, and with the nature of the obligations entered into, for the purpose of discovering and effectuating the intention really expressed by the parties."

In all these English cases, it will be observed that the words of connection between the covenants, were copulative conjunctions. But in *Peters v. Jervies*, Dyer, 240, where tenant *pur autre vie* leased for twenty-one years, and covenanted that he had not done any act, but that the leasee should quietly enjoy, and the *cestui que vie* died within the twenty-one years, it was held that the second covenant referred, by the word *but*, to the preceding limited one, and was therefore qualified by it, and the death of the *cestui que vie* not being of course an act of the covenantor, his covenant was not broken. The only material difference between this case and *Stannard v. Forbes*, was the difference of the conjunctions. So in *Broughton v. Conway*, Dyer, 240,

indeed unnecessary, but that too strong inferences could not be safely drawn from that quality in legal documents; that on the other hand the absurdity of guarding himself from covenanting against any acts but his own, and in the same breath covenanting that the term was not affected by the acts of any person whatever, was glaring, and was rendered still more so by the repetition of the qualifying words in the succeeding covenants, and it was held that the case came within the authority of *Browning v. Wright*.

The class of cases then, which may be said to be based upon *Browning v. Wright*, appear to decide that where the instrument contains one or more general or unlimited covenants, which are connected with or refer to, and have the same object as one or more preceding limited covenants, so as to join the latter with the former, it will be inferred that the covenantor intended that all the covenants should be restricted to his own acts or the acts of those claiming under him, and the preceding limited covenants will qualify and restrain the general ones; in other words, when it clearly appears that the covenants are to be as it were cast in one mould, all having the same

(see this case approved by Lord Ellenborough in *Gale v. Reed*, 8 East, 89, and applied to covenants contained in an agreement for the dissolution of a partnership), a covenant that the vendor had not done any act to disturb the vendee, but that the latter might enjoy without the disturbance of him or any other person, was held to be confined to acts done by the vendor, though of this case Sir Edward Sugden remarks that, "certainly there were express words to get over, namely, 'or any other person,' which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive that no word was rendered inoperative, (except perhaps in *Stannard v. Forbes*, where the words, "otherwise than by effluxion of time" were rendered inoperative or useless by the construction adopted by the Court.) But the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will frequently influences the whole will."

extent, courts will not pick out one of them in which the limitation is less strongly or distinctly expressed than in the others, and upon it, fasten on the covenantor a general liability.

In the absence, however, of any such direct connection with or reference to each other, as would irresistibly lead to the above conclusion, when the limited covenants belong to a different class or rather have a different object from the unlimited ones, they will be held to produce no effect upon each other, and the former will not qualify the latter. This distinction between the different covenants was briefly recognized in an early case,¹ and was subsequently adopted fully by Lord Ellenborough in *Howell v. Richards*.² In that case the defendant covenanted that notwithstanding any act done by him he was seized and had good right to convey, "and likewise," that the plaintiff should quietly enjoy without the interruption of the defendant or his heirs or any other persons whatsoever, followed by a similar general covenant against incumbrances, "excepting only a chief rent." It was contended (partially on the authority of *Browning v. Wright*,) that these two last general covenants were restrained by the former limited ones, but Lord Ellenborough held that there was no connection whatever between them. Not only were there no such copulative words as to lead to the conclusion that they were all to be considered together, but great stress was laid upon the different

¹ *Norman v. Foster*, 1 Modern, 101. Chief Justice Hale there said, "If I covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me, these are two several covenants, and the first is general and not qualified by the second," to which Wylde, J., agreed and said that one covenant went to the title, and the other to the possession.

² 11 East, 639.

character and object of the limited and of the general covenants. "It is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment.¹ He may suspect, or even know, that his title is in strictness of law in some degree imperfect; but he may at the same time know that it has not become so by an act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death, or the like; but these imperfections, though cured, so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence therefore which might require the qualification of one of these covenants, might not require the same qualification in the other of them, affected, as it is, by different

¹ See the remarks of Tilghman, J., in *Bender v. Fromberger*, 4 Dallas, 441, cited *infra*.

considerations, and addressed to a different object ;” and he added, that he did not find any case in which the covenant for quiet enjoyment was all one with the covenant for title or parcel of that covenant,¹ or in necessary construction to be governed by it otherwise than as according to the general rules for the construction of deeds, every deed was to be construed, —that is, according to the intention of the parties.

Little stress appears to have been laid in the decision, on the presumption that the covenant against incumbrances was meant to extend beyond the acts of the covenantor, from the fact that there *was* expressly excepted “the chief rent issuing to the lord of the fee, if any such should be due ;” and on the maxim, that *expressio unius est exclusio alterius*, it might be fairly inferred that this was to be the only exception.

Not long after, came the case of *Nind v. Marshall*,² where, in an assignment of a leasehold, the covenants were, that notwithstanding any act done by the seller, the lease was a valid one, and further, that the purchaser might peaceably enjoy, without interruption from the seller, his executors, &c., or any other person or persons whomsoever, having or lawfully claiming, &c., any estate in the premises, “and that” free from incumbrances by the seller, concluding with a limited

¹ This distinction between the different natures of the covenants was also observed in the opinion delivered by Sewall, J., in *Sumner v. Williams*, 8 Mass. 162, already referred to ; “the covenants preceding and the covenants subsequent to the covenant against incumbrances, are not of the same import. Covenants respecting the seizin, the power to convey, and the general title, may well consist with a restrictive covenant against incumbrances, 2 Rol. 250 l. 5. And, taken together, the several covenants stand unconnected in sense and expression, and uncontrolled the one by the other.”

² 1 Brod. & Bing. 319 ; S. C. 3 Moore, 702.

covenant for further assurance. Here, then, were three limited covenants, and one, the covenant for quiet enjoyment, unlimited, if it were to be construed as standing alone. The plaintiff having been evicted by the evidence of the original lessor, it was strongly urged that this case was identical with *Howell v. Richards*, as the limited covenants were those which assured the title, and the absolute one was that which assured the possession, and the reasoning of Lord Ellenborough was, therefore, directly applicable, and that further, a different construction would render inoperative the words, "or any other person or persons whomsoever." It was, however, held by the Court,¹ that the case was distinguishable from *Howell v. Richards*, which, it was said, proceeded mainly upon the exception of a chief rent from the covenant against incumbrances, which thereby, indicated that with that exception, the covenant was to be a general one—but that in this case the covenant against incumbrances, which was unquestionably limited, was intimately connected with that for quiet enjoyment; so much so, that there would be no use of superadding that no judgment, suffered by the covenantor, should operate to the covenantee's disturbance, if the covenant for quiet enjoyment were to stand absolute and unqualified, that no lawful claim whatever should operate to his disturbance. With respect to the generality of the expression, "all persons whomsoever," "I think," said Dallas, Ch. J., "that those must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them." But Park, J., in dis-

¹ Dallas, Ch. J., Richardson and Burrough, Js., Park, J., dissenting.

sending from these opinions, correctly observed, that the circumstance of the chief rent in *Howell v. Richards*, formed no ingredient in the judgment in that case; "it was not even hinted at, and was only mentioned by Lord Ellenborough in stating the record." The truth is, that the distinction taken by his Lordship, (which Sir E. Sugden has observed to be a very just one), between the different natures of the covenants, seems not to have been observed in *Nind v. Marshall*.

In attentively considering these two cases, their difference seems to be this. In *Howell v. Richards* it was by no means clear that the covenantor did not mean the covenants for quiet enjoyment and against incumbrances to be unlimited, both from the fact of the chief rent being the only exception to the latter, and for the very satisfactory reasons given in the opinion, that a covenantor might not feel safe in warranting the absolute perfection of his title, though he would feel justified in warranting against the improbable *consequences* of a flaw in it. Here, then, the apparent intention of the covenantor, and the rule of law, *verba cartarum fortius accipiuntur contra proferentem*, went together, and the two covenants were accordingly held to be unlimited. But in *Nind v. Marshall*, if the intention of the covenantor had been that one of the covenants should be unlimited, as it might seem on the one hand to be from the use of the words "and all persons whomsoever," the direct words of connection with the other limited covenants would have to be disregarded; while on the other hand, if the intention were that all the covenants should be limited to his own acts, the words "and

all persons whomsoever," would either have to be disregarded or receive a somewhat forced construction. There can be little doubt that the latter was the intention of the covenantor, (or rather of the conveyancer), who, evidently, had not in his mind the train of reasoning noticed by Lord Ellenborough, and inadvertently did not express his intention to limit all his covenants with sufficient distinctness as to one of them; and in this dilemma the maxim referred to was not followed, and the intention of the covenantor was construed with much liberality. Indeed, it is scarcely too much to say, that this rule of law, which requires a strict construction put on the words of the party using them, is, as to this subject, at least in the modern cases, seldom or ever applied, except where the intention of the covenantor evidently harmonizes with the rule, and its application is therefore useless.

It is certainly hard on the one hand that the use of a certain form of expression should fasten upon a party a liability when there are other expressions which raise a doubt as to whether he intended that such should be the case; and on the other, it would be dangerous, if, as was said by Park, J., "judges were to permit themselves, (which they have no right to do), to exercise vague conjectures about the hardship of cases, and to consider ingeniously what the parties must have meant when the words used are clear and precise, admitting of no ambiguity at all." So, it was said by Bayley, J.,¹ "I admit that the words of a covenant may be restrained by other words in the deed if we can see a clear intention to restrain them from the other parts of the deed.

¹ *Barton v. Fitzgerald*, 15 East. 546.

But it would be a very dangerous rule if it were to be applied to every case where ingenuity can show that, by giving the natural meaning to the words of the general covenant, other words in other parts of the deed might be rendered nugatory."¹

2. But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or unless the covenants be inconsistent.

In an early case,² on an assignment of a lease, the

¹ The case of *Barton v. Fitzgerald*, depended, as Sir E. Sugden says of it, on very particular circumstances. In an assignment of a lease, reciting the lease to be for the term of ten years, there was a covenant that the vendor had done no act to incumber, except an underlease; "and also," that the lease was subsisting, and not void or voidable, together with limited covenants for quiet enjoyment and for further assurance. It turned out, though there was no mention of it in the recital, that the lease was, *pur autre vie*, for ten years, and, upon the death of the *cestui que vie*, the term expired, when the purchaser brought covenant. It was held by Lord Ellenborough, the other Judges concurring, that the second covenant was general and unlimited, and could not be restrained by the limited ones. The opinions proceeded mainly on the recital, which was, that the premises were demised for a term of ten years, and that by assignment in the following year, they had become vested in the then assignor for the remainder of the term. "Then when he covenants," said Le Blanc, J., "that the lease is valid in law for the premises thereby assigned, is not that a covenant that it is a lease valid for the whole term for which it is before expressed that it had to run?" Lord Ellenborough said, "If the rest of the covenants had imported a contrary intent to the general words, then appearing to have been improvidently introduced into one part of the deed, the case would have admitted of a different consideration."

In this case, therefore, a key to the construction was furnished by the recital. But care must be taken not to give to a recital, on the ground of this authority, an importance to which it has no claim, being in general in a deed, "of no effect or operation," 3 Chan. Cases, 107, and "not amounting even to a direct affirmation." Co. Litt. 352 b. This is here referred to because Courts have more than once gone so far as to hold that a recital amounts to a covenant, a proposition which, as Sir Edward Sugden justly remarks, "certainly cannot be supported." 2 Vend. 526. See page 356.

² *Gainsford v. Griffith*, 1 Saunders, 58.

vendor covenanted that it was a valid lease, and should so endure during the remainder of the term, which was followed by limited covenants for quiet enjoyment and against incumbrances; and it was held that the generality of the preceding covenant was not restrained by the latter.¹

So where in *Hesse v. Stevenson*,² on an assignment of certain shares in a patent for paper making, there was a covenant of full power and authority to make the assignment, and that the covenantor had not done any thing to forfeit any right or authority he ever had, &c., Lord Alvanely held, that unless it irresistibly appeared that the parties could not intend to make a general covenant, the Court ought not to indulge them in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood; and as the

¹ Lord Eldon said of this case, (in *Browning v. Wright*), that the assignor seemed to have said, "I not only covenant for the goodness of my title, but that you shall enjoy under that title without any interruption from me," and to the same effect are *Newton v. Forster*, 1 Mod. 101; and *Trenchard v. Hoskins*, Winch, 93; S. C. Lit. 62, 65, 203.

In the elaborately reasoned case of *Sumner v. Williams*, 8 Mass. 162, the members of the Court differed as to the effect produced by the insertion of a limited covenant against incumbrances between preceding and subsequent unlimited covenants for seizin and warranty; Parker, J., holding that the limited covenant qualified the others, which might be considered "as limited and restrained in their operation by the whole context of the deed." There were special circumstances connected with these covenants, which might tend to lead to this conclusion. They were made by administrators, and although a majority of the Court held them personally liable on their covenants, yet the circumstance of their acting *en autre droit*, did certainly, as the learned Judge remarked, aid the construction. It was, however, held by Sewall, J., that "covenants respecting the seizin, the power to convey, and the general title made without restriction, may well consist with a restrictive covenant against incumbrances. And taken together, the several covenants recited stand unconnected in sense and expression, and uncontrolled the one by the other."

² 3 Bos. & Pull. 565.

words, "notwithstanding any act done by him," were omitted from the first covenant, the omission of those words was of itself decisive, as the attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts,¹ and it was well added, that the rule of construction in *Browning v. Wright* had never been carried to such a length as to decide that because some clauses are introduced into a deed which do not add to the security provided by the other clauses, the security so provided is to be restrained.²

In *Cole v. Hawes*,³ the grantor covenanted that he was well seized of the premises, and had good right

¹ It should, however, be noticed of this case, that there are many reasons why the covenants in the assignment of such a patent should be interpreted with the greatest strictness against the party making them.

² In the *Attorney General v. Purmort*, 5 Paige, 620, there was a general warranty to the grantee and his heirs, "and if he or they shall be legally evicted, to pay the value of the premises with the improvements at the time of such eviction, with the legal and necessary charges of defending the same, *if by reason of any incumbrance of the said party of the first part, his heirs or assigns.*" This deed was delivered as a general warranty deed, the clause in italics being inserted in the handwriting of the grantor, who was a lawyer, at the end of the covenants, which were printed; and it was urged that the grantor intended by this clause to restrain and qualify all his prior covenants for title, and, therefore, fraudulently delivered the deed as containing a general warranty. But Walworth, Chan. said, "I think it very evident from the whole transaction, that the written clause was inserted in the deed by him for a different and much more honest purpose. The printed blank used upon that occasion was from a form which I had myself prepared and had printed, to be used only in special cases. And the concluding clause, making the grantor liable in case of eviction, for the full value of the premises, with the improvements at the time of such eviction, without reference to the amount of the consideration expressed in the conveyance, was not usually inserted in full covenant warranty deeds. The defendant had a right to the written qualification of this extraordinary and unusual covenant to the case of an eviction, on account of an incumbrance created by himself. I am satisfied, therefore, that he inserted the written clause for this purpose only, and not to qualify or alter the legal effect of the other covenants in the conveyance."

³ 2 Johns. Cases, 203.

to convey them, to which was added a covenant of warranty "against all claims and demands whatever, *except the lord of the soil*;" and it was held that these words expressly declared to the grantee that there was a lord of the soil, and it could not be supposed that the grantor could in one line covenant absolutely that he was seized, when he admitted, and it was so understood by both parties, that there was a lord of the soil, who, in the next covenant, was excepted from its operation. The exception was manifestly intended to apply to both covenants.¹

So in *Milner v. Horton*,² the two first covenants, viz., for good title, and for right to convey, were unlimited; the two last, for quiet enjoyment and against incumbrances, were limited to the acts of the covenantor, but the Court of Exchequer held that it was the intention of the covenantors by the two first covenants to bind themselves that the vendees should have a good estate, *so far as rested in them*, and therefore considered them as qualified by the subsequent covenants. But soon after, this case was overruled by the Court of King's Bench, in *Smith v. Crompton*,³ where the vendor sold by virtue of a power, and covenanted that the power was in full force, and that he had good right to convey, which was followed by limited covenants against incumbrances, for quiet enjoyment and for further assurance, and the Court said, that looking at all the cases which were cited for the defendants, there was only one, (*Milner v. Horton*), where a general covenant had been held to be qualified in the manner here contended for, unless there

¹ The student should be careful not to rely too strongly on this case in practice.

² M'Clelland's R. 647.

³ 3 Barn. & Adolph. 189.

appeared something to connect it with a restrictive covenant, or unless there were words itself in the covenant amounting to a qualification; and it was further said that, having considered *Milner v. Horton* again since the argument, the Court could not feel themselves bound by its authority, and therefore concluded that the covenant declared upon, being unqualified in itself, and unconnected with any words in the qualified covenant, must, in a court of law, be considered as an absolute covenant for title.¹

¹ So in an early case in Pennsylvania, *Bender v. Fromberger*, 4 Dallas, 440, which was decided three years after *Hesse v. Stevenson*, though without referring to that case. Tilghman, Ch. J., thus introduced the statement of the covenants contained in the deed: "I subscribe to the principle laid down by Lord Eldon in the case of *Browning v. Wright*, cited on the part of the defendant, that where it manifestly appears from a consideration of every part of the deed, that no more than a special warranty was intended, it shall be so construed, although the deed in one part contains words of covenant of more general import. To this rule I add the two following ones: That in construing a deed, no part shall be rejected unless it produces contradiction or absurdity, and that in doubtful cases, a deed is to be construed in favor of the grantee. The deed in question contains a conveyance by the words, grant, bargain and sell; a covenant that the grantor is seized of a good estate in fee simple, subject to no incumbrances but a certain ground rent, and a covenant of special warranty.

"It has been the prevailing opinion, that by virtue of an Act of Assembly, passed in the year 1715, the words grant, bargain and sell have the force of a general warranty, unless restrained by subsequent expressions. To qualify the general warranty it has been the custom of scriveners to insert a clause of special warranty. And I believe it is inserted pretty much as a matter of course, unless in cases where the parties agree on a general warranty. . . The defendant contends that his intent was to give no more than a special warranty, because the clause of special warranty is inconsistent with, and contradictory to, a general warranty. Now, in this, I cannot agree with him. It is certain that the special warranty, and more, is included in the general one. It is an inaccurate mode of conveyancing; but there is no absurdity or contradiction, in making one covenant against yourself and your heirs, and another against all mankind. The special warranty was unnecessary, and it is to be attributed to the ignorance of the scrivener, who probably thought it was a matter of course, without intending to affect the more general preceding covenant; or perhaps he might think it necessary to guard against the effect of the words, 'grant, bargain and

3. As, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant.

In an early case,¹ one seized of an estate under a grant from the Crown, in conveying it to a purchaser, recited the letters patent and the conveyances from thence down to himself, and covenanted that he was seized in fee, that he had good power to convey, and that there was no reversion in the Crown, notwithstanding any act done by him. The Court below held that these last words restrained the generality

sell,' used in the first part of the deed, because the estate was subject to a ground rent, as appears from the general covenant, in which it is said that the estates is free from all incumbrances except the said ground rent. It has been urged, that it is all *one covenant*, because the special warranty is connected with the preceding general covenant, by the words, *and that*. It is very common to connect a covenant of *warranty* and a covenant for *further assurance* by these expressions. But what I rely on, is the intent of the parties manifested in the deed considered altogether. I do not conceive it is possible for a man of common sense to declare, that he engages that he had a perfect estate in fee simple, and had a good right to convey such perfect estate, without intending to warrant to a greater extent, than against himself and his heirs. These are no technical expressions, but such as every man understands, which is not the case with a special warranty. To a common man, it is not very intelligible, that there should ever be occasion to warrant and defend against himself, and all persons claiming under him, for, it is very natural to suppose, that when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself, and all persons claiming under him, without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty is generally the act of scriveners; but, I presume, that no scrivener could be so stupid as to insert a covenant that 'the grantor was seized of an indefeasible estate in fee,' unless he had been told by the parties that a general warranty was intended. I am, therefore, of opinion, that the special warranty in this deed has not the effect of controlling the precedent general covenant." Although the decision in this case is no longer law, as applied to the statute to which it refers, (it having been soon after held that the covenants implied by it were all limited, and none of them general covenants), yet it explains very clearly the general rule which was referred to in *Hesse v. Stevenson*, and *Smith v. Compton*.

¹ *Trenchard v. Hoskins*, Winch, 91.

of the two first covenants, but this was reversed on writ of error;¹ it was held that the restrictive words did not extend to the preceding covenants, "and the only ground on which I suppose the Court to have proceeded," said Lord Eldon, in speaking of the case in *Browning v. Wright*, "is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seizin in fee in all cases but one, namely, that he should not be liable on the objection of a reversion existing in the Crown,² unless that reversion appeared to have been vested in the Crown by his own acts."

4. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of others, though they all relate to the same land.

Thus, in *Crayford v. Crayford*,³ where a vendor covenanted that he was seized in fee, notwithstanding any act done by him or his ancestors; that there was no reversion in the Crown; that the estate was of a certain annual value, and that the plaintiff should enjoy the estate, discharged from all incumbrances made by him or his ancestors, it was held that "the covenant for value was an absolute and distinct covenant, and had no dependence upon the first part of

¹ See 1 Siderfin, 328, and 1 Saunders, 60.

² "In grants of land by the Crown," says Sir E. Sugden, 2 Vend. 535, "it is usual to reserve a reversion, which the grantee cannot bar." It may also here be mentioned that the same author states, that in conveyances by the Crown, a purchaser is not entitled to any covenants for the title. 2 Vend. 453.

³ Cro. Car. 106.

the covenant;" and in a subsequent similar case¹ the construction was the same.

In the very recent case of *Young v. Raincock*,² a house, which had been the property of one Ann Hopley, was, after her death, sold by her daughter, whose husband covenanted with the purchaser, that notwithstanding any act or default of him, his wife, or Ann Hopley, the grantors were seized; that notwithstanding any such act or default, they, or one of them, had good right to convey; that the covenantee should quietly enjoy, without interruption from them, or either of them, or any one claiming under Ann Hopley, and that the grantors, and every one claiming under them, or under Ann Hopley, should make further assurance upon reasonable request. It turned

¹ *Hughes v. Bennett*, Cro. Car. 495; S. C. 1 Jones, 403; see *Rich v. Rich*, Cro. Eliz. 43; and *Belcher v. Sikes*, 8 Barn. & Cress. 185.

It is proper here to mention what has already been casually referred to, that even although all the covenants in a deed may be unlimited, yet that an agreement in the deed that they are to extend only to the acts of the covenantor and his heirs, will be recognized and enforced in a court of law. Thus, although it was urged in *Brown v. Brown*, 1 Lev. 57, S. C. 1 Keble, 234, that the agreement was a remote one at the end of the deed, and far distant from the covenants, it was nevertheless held to qualify them. So, where the obvious meaning of the covenants renders it necessary, courts will construe one word to mean another, as is constantly done in wills, as where, in a case in New York, (*Sanders v. Betts*, 7 Wendell, 286), the party of the first part in a deed covenanted to warrant and defend the premises from all persons claiming "by, from or under him, the said party of the *second* part," the plaintiff urged that all these words must be rejected as being repugnant to the preceding matter. But the Court held that *second* had been inadvertently used instead of *first*, and construed the covenant as being a limited one only. On the same principle, a court of equity will perpetually enjoin proceedings upon covenants which appear to be made general, contrary to the intention of the parties, in the same manner as errors are corrected in marriage articles. *Fealden v. Studley*, Finch, 90, (cited also in 2 Bos. & Pul. 26, per Lord Eldon, and 3 id. 575, per Lord Alvanley); *Coldecott v. Hill*, 1 Ch. Cas. 15; *Farren v. Farrar*, cited in the last case. 2 Sug. Vend. 536.

² 7 Common Bench, 310; S. C. 13 Jurist, 536.

out that the daughter was illegitimate, and the purchaser was evicted by the rightful heir. It was clear that the only covenant upon which the plaintiff could recover was that for quiet enjoyment, as the entry of the heir was not caused by any act or default of Ann Hopley. The defendant, therefore, contended, on the authority of *Browning v. Wright* and *Nind v. Marshall*, that the restrictive words must be drawn down from the two first covenants and embodied in the third; but Coltman, J., who delivered the opinion of the Court, said: "It cannot be disputed, that the general introductory words of one of the usual covenants for title, may be drawn down in this way, and applied to others, in which they are not to be found, where, from what is found in other parts of the deed, it appears that such must have been the intention of the parties. But, admitting this principle, the question will remain, what reason there is for introducing into the present covenant, by implication, a restrictive clause which is not found in it. The covenant, read without the restrictive clause, seems to be a reasonable and usual one. The estate in question is recited to have been purchased by Mrs. Hopley, and is sold by one purporting to represent her as heir. On such a conveyance, it would be reasonable to expect that the estate should be cleared from any charges from Mrs. Hopley downwards to the present purchaser: and, accordingly, the covenant, as it stands, is a covenant for quiet enjoyment against any lawful let, &c., by Raincock and wife, or by any other person lawfully or equitably claiming from or under Raincock and wife, or either of them, or the said Ann Hopley. The covenant, as it stands, without the restrictive words, is quite consistent with the covenant for further

assurance, by which it is covenanted that Raincock and wife, and every other person claiming under them or either of them, or under Ann Hopley, shall make further assurance, on every reasonable request. But, if the restrictive words which it is sought to introduce into the covenant for quiet enjoyment, are to be considered as introduced into it, and have the effect contended for,—that the entry by Peter Hopley, not being occasioned by any act or default of Mrs. Hopley, is not a breach of the covenant for quiet enjoyment,—this inconsistency will result from it, that the covenant for quiet enjoyment will not extend to protect the purchaser from a disturbance by Peter Hopley; but the covenant for further assurance will entitle the purchaser to a conveyance from Peter Hopley of his right to the estate, or, in case of refusal, entitle him to maintain an action against the present defendant for such refusal.”

So, in the recent case of *Crossfield v. Morrison*,¹ where in the assignment of a lease from the plaintiff to the defendant, the latter covenanted that he would, during so long as he should be in possession of the rents and profits, pay to the original lessors the rent reserved, and perform the covenants contained in the lease from them to the plaintiff, and keep him harmless and indemnified of and from the rents and covenants. The breach assigned was, that certain rents became due to the owners of the reversion, which the plaintiff was obliged to pay, and the jury having found that the defendant was not in possession of the rents and profits at that time, the latter contended that the covenant to indemnify was restricted to such time as he should be in possession. But the

¹ 7 Common Bench, 286; 15 Jurist, 565.

Court held that the possibility of a re-sale must have entered into the minds of the parties. On such sale taking place, it was to be expected that covenants would be entered into by the purchaser to perform the covenants of the original lease, but the purchaser might make default in performing them, and it was therefore reasonable the plaintiff should require from the defendant a covenant to indemnify him against any breach of those covenants. It was, therefore, held, that the covenant to indemnify was not restricted, and judgment was entered for the plaintiff *non obstante veredicto*.

The cases which have thus been cited will give some idea of the difficulties which present themselves, where, under a highly artificial and refined system of conveyancing, the occasional unskillfulness of the draftsman has caused limited and unlimited covenants for title to come, as it were, into collision with each other. The absence of American authority on this subject must have been observed by the reader. It is owing to two causes. In the first place, a very cursory examination of American reports will show, what has been frequently referred to, that the niceties of English conveyancing, (which are in no respect carried to a greater extent than in the covenants for title), were neither brought by our forefathers to this country, nor adopted by their descendants. These covenants were generally, or frequently, inserted in the most primitive manner, and very often, as is the case at the present day, the only express covenant employed was that of warranty. Hence there was little room for the complexities which attend the introduction of many and elaborate covenants. In

the second place, in many of the States, some or all of these covenants have been implied by statutory enactment from the use of certain words employed to pass the estate, and all the covenants, when thus implied, have generally been cast in the same mould, so that there was no distinction between them as to one being more general or more limited than another. Sometimes, from the inadvertent penning of the statute, this has not been the case, and the rules of construction which have there been adopted, will be presently referred to.¹

Having thus attempted to consider in what manner covenants for title may be limited or restrained, by the insertion of other covenants or express agreements, in the same conveyance, it may be proper to notice a somewhat similar and an important question, which is, how far covenants for title may be limited by the context of the deed in those parts of it which are generally termed descriptive. Thus, in an early case in New York, where a lessee assigned the lease "in as ample a manner, to all intents and purposes, as I might or could hold or enjoy the same, and I covenant with the said P. K. that I have good and lawful right to transfer the said premises, as is above written, and that the same are clear of all incumbrances," it was held that the words, "as is above written," qualified the covenants, and that it could not be supposed that the assignor meant to warrant his landlord's title.²

¹ See *infra*, p. 403, *et seq.*

² *Knickerbocker v. Killmore*, 10 Johns. 166.

The facts of the covenants being contained in an assignment of a lease, strongly influenced the Court in their decision, but where in an old case, (*Corke v. Fowndes*, 1 Lev. 40, S. C. 1 Keb. 95), the vendor covenanted that he was seized of a good estate in fee, according to the indenture made to

So, in a case in Massachusetts,¹ where the conveyance was of all the grantor's right, title and interest in the premises, it was held that a general warranty which the deed contained, was limited to be an assurance of that particular estate only, and, therefore, could not be held to operate by way of estoppel, in passing an after-acquired estate. So in a subsequent case in the same State,² the conveyance was, of "all

him by B., of whom he had purchased, it was held a general covenant, for the reference to the conveyance served only to denote the limitation and quantity of the estate, and not the defeasibleness or indefeasibleness of the title.

¹ *Blanchard v. Brooks*, 12 Pick. 67; and see and consider *Jackson v. Hoffman*, 9 Cowen, 271. That case decided, that where a deed contained a recital of a mortgage, followed by unlimited covenants, the mortgage was excepted from their operation. Such a doctrine seems very questionable, (see *Keith v. Day*, 15 Verm. *supra*, p. 122, *et seq.*) and it is always in the power of the vendor to except the mortgage from the operation of the covenants, as in *Potter v. Taylor*, 6 Verm. 676, where, after a covenant against incumbrances, there was inserted, "except the amount of a mortgage held by B. K., on which is due about eighteen tons of hay," and it was held that the covenant was broken only as to any excess there might be due over the eighteen tons.

² *Allen v. Holton*, 20 Pick. 463. "The objection would be well maintained," said Wilde, J., who delivered the opinion of the Court, "if a literal construction of the covenant of warranty could be allowed without reference to the other parts of the deed. But every deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed. 4 Cruise's Dig. tit. 32, Deed, c. 23, § 8. The case of *Moore v. Magrath*, Cowp. 9, is a strong case to show to what extent a court may go in qualifying, and even in rejecting a particular clause in a deed, in order to effectuate the intention of the parties. In that case, the lands intended to be granted by a deed of settlement, were particularly named in the preamble, and were afterwards minutely described in the premises, and then followed a sweeping clause purporting to convey, 'all other the donor's land, tenements, and hereditaments in Ireland.' And the Court held that nothing passed by this sweeping clause; the Court being of opinion, from the words of the preamble, that the donor did not intend to include his paternal estate, (which was situate in a different county from those in which the lands intended to be conveyed were situate), and that it was more than probable, that the drawer, by mistake, omitted some words in the sweeping clause.

my right, title and interest in and to Tiffany's Ferry, and the boat which I built the last season, and now use in carrying on the ferry, and all the estate, land and buildings standing thereon, situate and being in Northfield, as the same is now occupied and improved by me, and I do covenant that I am the lawful owner and possessor of the before-granted premises, and have in me good right, &c., to give, grant and confirm the same," followed by a general warranty of "the before-granted premises." The grantor in this conveyance being offered as a witness in support of the title in favor of an alienee, was objected to, on the ground of his liability on these covenants, but the Court held that the covenant was restrained by the previous context of the deed, and, consequently, that the witness was competent.

So in a recent case¹ where the grant was of "All my right, title and interest in and to that parcel of real estate situate in Green street, in Marblehead, and is bounded south-east," &c., followed by unlimited covenants for seizin, good right to convey, against incumbrances, and of warranty, it was held that these covenants were limited merely to the right and title of the grantor, whatever that might be.²

"Whatever may be thought of the intention of the parties in that case, we think the intention as to the extent of the grant in the present case, is sufficiently plain. The grantor conveys his own title only, and all the subsequent covenants have reference to the grant, and are qualified and limited by it. That this was the intention of the parties, cannot, we think, be reasonably doubted, and the words of the covenants are to be so construed as to effectuate that intention."

¹ Sweet v. Brown, 12 Metc. 175.

² "The warranty is of the premises which were granted and conveyed by the deed. But that was 'all my right, title, and interest in and to that parcel of real estate situate,' etc. It was not a grant of certain land, in general terms, but of his title and interest in such lands, and this, particularly and fully expressed. The warranty must be taken in a limited sense.

We now enter upon the consideration of the covenants for title which have been implied by statutory enactment.

Although the common law gave no effect of implied warranty in the case of a freehold to any other word than *dedi*, yet such an effect was, in the year 1707, given to the words "grant, bargain, and sell," by the statute of 6 Anne, c. 35,¹ the 30th section of which enacted "that in all deeds of bargain and sale hereafter inrolled in pursuance of this act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words *grant, bargain, and sell*, shall amount to, and be construed and adjudged in all courts of judicature, to be express covenants to the bargainee, his heirs and assigns, from

It must be restricted to his title and interest. The covenant here attaches to the estate and interest conveyed, and is not a general covenant of warranty of the whole parcel, particularly described by metes and bounds. Such construction will reconcile all parts of the deed, and give effect to each." The cases of *Blanchard v. Brooks* and *Allen v. Holton*, were in this case cited and approved, and to the same effect is *Wyman v. Harman's devisees*, 5 Grattan. In *Whiting v. Dewey*, 15 Pick. 434, it seems to have been thought that if the words "being all the same land which the said Benedict Dewey, deceased, lately owned," had been the only words of description used, they would have limited the general covenants which followed, but as the premises were, in the grant, particularly described by metes and bounds, the description was held not to limit the covenants.

In *Hurd v. Cushing*, 7 Pick. 169, where a tenant for life conveyed "all his right, title and interest" in the land with a covenant that he was seized in fee, it was held that only the life estate passed, for the covenant could not enlarge the estate. See *Shaw v. Galbraith*, cited *supra*, and *Den v. Forsyth*, 3 Dev. 26; *Snell v. Young*, 3 Iredell, 379. So where in *Corbin v. Healy*, 20 Pick. 514, one granted land to his daughter, "and the heirs of her body, to have and hold the same to her and her heirs forever," and covenanted to warranty and defend the same to her and her heirs, it was held that neither the *habendum* nor the warranty could make the estate other than an estate tail.

¹ An act which provided for a general registering of deeds, etc. in the East Riding of the county of York and in Kingston-upon-Hull, and for rendering more complete similar prior provisions for the West Riding of York.

the bargainor for himself, his heirs, executors, and administrators, that the bargainor notwithstanding any act done by him, was at the time of the execution of such deed, seized of the hereditaments and premises thereby granted, bargained, and sold, of an indefeasible estate in fee simple, free from all incumbrances, (rent and services due to the lord of the fee only excepted) and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him; unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators, and assigns respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale.”

This language is so clear as probably to account for the absence of all authority as to its judicial interpretation.¹

But the statute was of very limited local application, and probably even in those parts of the country over which it extended, it was but of little practical use, as the modes of conveyance there employed were

¹ It will be perceived that the covenants so created are carefully limited to the acts of the grantor, and those claiming under him. The words “notwithstanding any act done by him,” are the proper restraining words of the covenants for seizin and against incumbrances. Those for quiet enjoyment and for further assurance are also expressly limited in the usual manner. It is difficult to perceive how the covenants for title could be more limited, and yet to prevent the possibility of misconception as to a covenantor being bound even to this limited extent against his will, it is provided that even these covenants can be restrained and limited by express particular words in the deed.

generally deeds of lease and release, and might not, therefore, come within the letter of the enactment. Covenants for title continued to increase in luxuriance of growth, until their length, which brought with them a corresponding increase of expense, was found to be oppressively severe.¹

But until 1845, Parliament did not interfere. In that year was passed the statute 8 & 9 Victoria, Ch. 119, one of the series of those important enactments which are generally known by the name of "The Real Property Acts." Its object was more extensive than merely to curtail the length of the covenants for title, though, as these generally occupied more than half the conveyance, it was doubtless to a great extent intended for this purpose.²

¹ See the interesting and important evidence given by Mr. John Tyrrell, before the Real Property Commissioners in 1829, (1 Real Property Report, 507, etc.)

² The size which this work has attained forbids the insertion of the Act of 8 & 9 Vict. c. 119 at length. Its substance, however, may be thus given. Its first section declares that "whenever any party to any deed made according to the forms set forth in the first schedule to this act, or to any other deed which shall be expressed to be made in pursuance of this act, or referring thereto, shall employ in any such deed respectively any of the forms of words contained in Column I. of the second schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and be construed as if such party had inserted in such deed the form of words contained in Column II. of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number."

The second section declares that every such deed shall, unless exception be specially made, be construed to include all houses, out-houses, edifices, barns, stables, etc. etc., as well as all reversions, remainders, rents, profits, etc.

The subsequent section, provide for the stamp duty—that in taxing any bill for preparing such a deed, remuneration is to be estimated not according to its length, but the skill, labor, and responsibility incurred—that a deed failing to take effect under this act, shall as far as possible be held valid and effectual—that the word lands shall extend to all freeholds, corporeal and incorporeal hereditaments and copyholds capable of passing by deed; and

But the effect intended by Parliament has not been produced. "The use of these forms in preference to the ordinary instruments of assurance,"¹ says a very recent text writer, "is not obligatory or usual, nor

that every word importing the singular number only, shall extend and be applied to several persons or things as well as one and the converse and that the schedules are to be part of the act, which was to take effect on the 1st of October, 1845, and not to extend to Scotland. The first schedule referred to comprises merely a short form of a deed, not unlike the ordinary deeds of bargain and sale used in this country—the word of conveyance is simply "grant."

The second schedule is divided into two columns, of which a specimen is here given—

COLUMN I.	COLUMN II.
1. The said (covenantor) covenants with the said (covenantee) {	1. And the said covenantor doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, in manner following, (that is to say)
2. That he has the right to convey the said lands to the said (covenantee) notwithstanding any act of the said covenantor.	2. That for and notwithstanding any act, deed, matter or thing, by the said covenantor done, executed, committed, or knowingly or willfully permitted or suffered, to the contrary, he the said covenantor now hath in himself good right, full power, and absolute authority to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent and meaning of these presents.

Then follow similar forms for expressing the covenants for quiet enjoyment, against incumbrances, and for further assurance, for the production of title deeds, and that the grantor has done no act to incumber.

The Revised Statutes of Virginia have concisely adopted this statute. See *infra*.

¹ Dart on Vendors and Purchasers, 247. Sir E. Sugden too in his late abridgment of his former work on Vendors, as well as in his last edition of the complete work, passes over the statute of 8 & 9 Victoria, with the most casual notice; and a professional gentleman to whom reference could be safely made as to the extent to which the statute is actually employed at the present day, has confirmed the impression which the above remarks would suggest, *supra*, page 29. See also a severe criticism on this statute in 9 Jurist, Part 2, 333-4.

does it appear to be expedient. Such enactments are either unnecessary or mischievous;—unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use; and mischievous, if an unnatural and secondary meaning is given by statute to words which are *prima facie* clear and intelligible; for the effect is, to increase the difficulty of legal documents to the unprofessional reader.”

But although statutes giving to the granting words of a conveyance the effect of certain covenants for the title, are but little regarded in England, yet similar statutes, for the most part copied from the statute of Anne, have been passed in many parts of this country, and are regarded as being of practical importance. Within eight years after the statute of Anne, when Pennsylvania was still an infant province, “an Act for acknowledging and recording of deeds,”¹ was passed, the 6th section of which was evidently copied from the English statute, though the attempt at greater brevity has caused it to be less clear.

It declared that “All deeds to be recorded in pursuance of this Act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words, *grant, bargain, sell*, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: That the grantee was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, (excepting the rents and services due to the lord of the

¹ Act of 28th of May, 1715.

² The word “In” was probably omitted accidentally in transcribing this section.

fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators and assigns, may in any action, assign breaches, as if such covenants were expressly inserted.¹"

It will be observed, that apart from this proviso, and from mere verbal alterations, there are two very perceptible points of difference between the English and the Pennsylvania statute; the covenant for seizin in the latter not being introduced by restrictive words; and the former implying a covenant for further assurance, which the latter omits. Why this covenant was omitted, it is not easy to perceive, since it is often of great use to a purchaser. It might at first be supposed to be owing to the absence of a Court of Chancery in Pennsylvania, since a remedy upon this covenant is usually sought in equity, but it will be found that on the same day on which this Act was passed, there was also passed one of the Acts for erecting a supreme or provincial court of law and equity, (which, although repealed in Council four years after), would seem to negative this ground for the omission.

No doubt whatever could have arisen that all the

¹ The following proviso is at the end of this section: "Provided always, That this Act shall not extend to leases at rack rent, or to leases not exceeding one and twenty years, where the actual possession goes with the lease." This proviso has no particular connection with this section—if it had, it would be insensible, as the section is limited in application to deeds "whereby any estate of inheritance in fee simple" is conveyed, and the proviso would, according to this construction, exempt leases at rack rent, &c., to which the section never was intended to extend. The proviso is, therefore, awkwardly introduced. It refers, however, to the prior recording provisions of the Act, as appears from looking at the 29th section of the Statute of Anne, from which the clause is copied. It is, however, a little remarkable, that in many States in which this particular section of the Pennsylvania Statute has been adopted, the proviso has been also inserted.

covenants implied under the statute of Anne were limited to the acts of the grantor and those claiming under him, and did not extend to defects of title anterior to the conveyance to him. But in the wording of the Pennsylvania statute, it will be perceived that its author has made the first covenant, that for seizin, an unlimited one, while the subsequent covenants are restrained to the acts of the grantor. The question would hence arise as to whether the latter covenants restrained the former. Were it to arise upon express covenants introduced in a deed, there might, perhaps, be little difficulty in holding, under the authority of cases which have been already referred to, that the covenant for seizin stood by itself, an unlimited covenant, and unqualified by those which followed it. But where the question is upon the construction of a statute, there is every reason why the most limited interpretation should be given to covenants which every man is, as it were, obliged to enter into, when the words of implication are, as in Pennsylvania, those generally employed in conveyancing.¹

¹ In the first place, the covenants are implied, and the danger arising from such covenants has been often referred to by Courts in strong terms. In the second place, there is a different technical rule of construction called in to the interpretation of such a statute, and while, with respect to deeds, the rule is, that the words are to be taken most strongly against the party using them, in the construction of statutes the rule is equally familiar, that statutes in derogation of the common law are to be construed strictly. Now the common law gave no effect of warranty to the words, "grant, bargain, and sell," and it may not unreasonably be said that a statute altering the common law in this respect, should, when it is doubtfully expressed, be so construed as to give to the warranty the most limited extent.

I have heard it doubted from the bench, whether the statute could be held to apply to the case of a conveyance, made in execution of a power, on the ground that such vendors might not be grantors within the meaning of the statute. See the ensuing chapter; and see and consider the remarks

The case of *Bender v. Fromberger* has been already referred to. Mr. Chief Justice Tilghman there mentioned that it had been the general understanding of the profession, that the words "grant, bargain, and sell" imported a general warranty, and, acting on this ground, he held that this general warranty could not be restrained by a subsequent special warranty; and this, as a general proposition, was unquestionably correct. But in the subsequent case of *Gratz v. Ewalt*,¹ the construction of this statute was carefully considered, and it was held that the first covenant, which, standing by itself, would be unlimited, must be taken in connection with the subsequent one against incumbrances which is limited, and, consequently, that none of the covenants implied by the statute were to be construed as extending beyond the acts of the covenantor,² and the construction thus

of Mr. Charles Butler, in Co. Litt. 384 a, upon the subject of the unsoundness of the objection sometimes made by trustees to conveying by the word "grant." The greater part of this able note is, in some of the editions of the First Institutes, printed at the end of the volume.

¹ 2 Binney, 98.

² "The meaning," said Tilghman, Ch. J., who delivered the opinion of the Court, "is not clearly expressed; but I take it to be a covenant that the grantor had done no act, nor created any incumbrance, whereby the estate granted by him might be defeated; that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be, that the grantor was seized of an estate absolutely indefeasible, it was improper to add the subsequent words, 'freed from incumbrances done or suffered by him,' these words, instead of adding strength, would only serve to weaken what went before. The words, 'seized of an indefeasible estate in fee simple,' are to be considered, therefore, not as standing alone, but in connection with the words next following, 'freed from incumbrances done or suffered from the 'grantor.'" I am the more convinced that this was the intention of the legislature, by comparing the expressions in this Act, with the 30th section of the statute 6th Anne, ch. 35, which contains a provision on the same subject, and was evidently in the eye of the persons who framed our law. The British statute makes use of more words, and the

given has never been departed from in Pennsylvania.¹ And it is said by Mr. Chancellor Kent,² that "by the decision in *Gratz v. Ewalt*, the words of the statute are divested of all dangerous tendency, and that it

intention is more clearly expressed. It declares that the words, *grant, bargain, and sell*, shall amount to a covenant; that the bargainor, *notwithstanding any act done by him*, was, at the time of the execution of the deed, seized of an indefeasible estate in fee simple, &c. Our law seems intended to express the substance of the British statute in fewer words, and has fallen into a degree of obscurity, which is often the consequence of attempting brevity. I can conceive no good reason why our legislature should have wished to carry this implied warranty further than the British statute did, because it has had effects to annex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor, with which none but himself and those interested in keeping the secret, could be acquainted. As for any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms."

Had the case of *Bender v. Fromberger*, 4 Dall. 436, been presented after this determination, its decision would have been different, in case the deed had not contained express general covenants for seizin and of right to convey, as it was taken for granted, in that case, that the statutory covenants were general.

¹ *Funk v. Voneida*, 11 Serg. & Rawle, 111; *Whitehill v. Gotwalt*, 3 Penna. R. 323; *Seitzinger v. Weaver*, 1 Rawle, 377.

In this last case it was held that the statute applied not only to deeds executed, but to articles of agreement for the sale of real estate. "It is insisted," said Gibson, Ch. J., who delivered the opinion of the Court, "that the Act of Assembly, by force of which such a covenant can be implied, is applicable only to conveyances executed. No express provision to that effect is found in the Act itself; and there certainly is nothing in the nature of an executory contract to call for such a construction. Where the vendee has done every thing on his part to entitle him to the estate, the articles are an equitable conveyance of the title, and, therefore, fall within the letter, as well as the spirit of the enacting clause. He sometimes obtains no other title, and for that reason alone, the law ought to be construed liberally for his protection. Where a sound price has been paid for an unsound title, I see no objection, on this ground, to its being recovered back." The covenant against incumbrances was included here in the covenant for seizin, since the next sentence is, "But this special covenant of seizin is broken by the existence of an incumbrance created by the vendor, the instant it is sealed and delivered."

² 4 Com. 474.

will equally apply to the same statutory language in other States."

We are now to consider in what States there are similar provisions, and the construction which they have there received.

In none of the New England States does there appear to have been any such implied covenant created by statute.

None such ever existed in New York, and by the Revised Statutes,¹ "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." And although in *Kinney v. Watts*,² it was held that this abrogation of the rule of the common law extended to leases for a term of years, yet this was directly overruled in a more recent case,³ on the ground that a lease was not a conveyance of real estate, but only of a chattel interest.

The provision of the New York Revised Statutes has also been copied into those of Indiana⁴ and Michigan,⁵ though in the former, while a territory, an Act passed in 1804 was exactly copied from the Pennsylvania Statute.

Nor do any covenants for title seem to be implied by statute at the present day in the States of New Jersey, Maryland, North Carolina, South Carolina,⁶

¹ Part II., Art. 4, § 140. 2 Rev. St. 22.

² 14 Wend. 38.

³ *Tone v. Brace*, 11 Paige, 568, affirming the decree of the Vice Chancellor in the same case in 1 Clark's Ch. 503.

⁴ Rev. Stat. of 1843, c. 28, § 21.

⁵ Rev. Stat. of 1846, c. 65, § 5.

⁶ In South Carolina, an Act passed on the 12th of December, 1795, gave a short form of a deed of lease and release, in which was a general covenant of warranty expressed in the usual form; but a proviso declared that the Act

Georgia, Florida, Louisiana, Ohio,¹ Kentucky, Tennessee, Texas, and Wisconsin.

In Delaware in the year 1742, "an act for acknowledging and recording of deeds" similar in many of its provisions to the Pennsylvania statute of 1715, was passed, and its fifth section is identical with it.² The fifth section of the more recent Act of Feb. 7, 1829, is, however, much more concise, "where there is no express covenant in a deed, the words 'grant, bargain, and sell,' shall, unless specially restrained, imply a special warranty against a grantor and his heirs, and all persons claiming under him."

In Virginia the Revised Statutes of 1849, have been, as to this subject, adapted from the statute of 8 & 9 Victoria, c. 119.³

should not be so construed as to oblige persons to insert the clause of warranty, nor to prevent them from inserting such clauses as should be agreed upon; and in Texas the Act of 5 February, 1840, is to the same effect.

¹ In Ohio, an Act passed August 1st, 1795, called "A law establishing the Recorder's office," was nearly or exactly copied from the Pennsylvania Statute. It was afterwards repealed. Another Act, passed January 2, 1815, gave a right of action in all cases where a deed contained a covenant of general warranty, in like manner as if the deed contained a covenant of seizin, and the same evidence to support the action, and the same damages might be recovered as in an action on the covenant of seizin. This law was repealed and re-enacted in substance on the 3d of February, 1824, and was entirely repealed by the Act of March 12, 1831. The decisions under these statutes while in force, are *Innes v. Agnew*, 1 Ohio, 389; *Day v. Brown*, 2 id. 346; *Robinson v. Neil*, 3 id. 525. The statute of 1815 seems not to have been very clearly expressed or distinctly understood. *Day v. Brown*. See note to p. 274, of Statute of 1841.

² 1 Booth's Edition of Delaware Laws, 222.

³ Revised Statutes of Virginia, (1849.) Title 33, Chap. 117.

"§ 9. When a deed uses the words 'the said ——— covenants,' such covenant shall have the same effect as if it was expressed to be by the covenantor, for himself, his heirs, personal representatives and assigns, and shall be deemed to be with the covenantee, his heirs, personal representatives and assigns.

"§ 10. A covenant by the grantor in a deed, 'that he will warrant generally the property hereby conveyed,' shall have the same effect as if the

In Illinois the Revised Statutes of 1839 copied literally the section of the Pennsylvania Statute, and it was re-enacted in the Revised Statutes of 1845, c. 24.

grantor had covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever.

“§ 11. A covenant by any such grantor, ‘that he will warrant specially the property hereby conveyed,’ shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through, or under him.

“§ 12. The words ‘with general warranty,’ in the granting part of any deed, shall be deemed to be a covenant by the grantor, ‘that he will warrant generally the property hereby conveyed.’ The words, ‘with special warranty,’ in the granting part of any deed, shall be deemed to be a covenant by the grantor, ‘that he will warrant specially the property hereby conveyed.’

“§ 13. A covenant by the grantor in a deed for land, ‘that he has the right to convey the said to the grantee,’ shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey the said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed or intended so to be by the deed, and according to its true intent.

“§ 14. A covenant by any such grantor, ‘that the grantee shall have quiet possession of the said land,’ shall have as much effect as if he covenanted that the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon and have, hold and enjoy, the land conveyed by the deed or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging, and receive and take the rent and profits thereof to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever. If to such covenant there be added ‘free from all incumbrances,’ these words shall have as much effect as the words, ‘and that freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said grantor or his heirs saved harmless and indemnified of, from, and against any and every charge and incumbrance whatever.’

“§ 15. A covenant by any such grantor, ‘that he will execute such further assurances of the said lands as may be requisite,’ shall have the same effect as if he covenanted that he, the grantor, his heirs or personal representative, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds and things, for the better, more perfectly and absolutely

In Alabama, the 29th section of the Act of 4th March, 1805, was copied exactly from the Pennsylvania Statute, and adopted in the Revised Statutes of 1823,¹ and in *Roebuck v. Dupuy*,² the decision in *Gratz v. Ewalt* was approved, and applied to it.

In a subsequent case,³ the words of the conveyance were "bargained, sold, released, aliened and confirmed," and upon a demurrer to the declaration, it was held that these words did not come within the Act, inasmuch as there could be no question that these words imported no warranty at common law, and the statute which altered the common law should not have its meaning stretched beyond its letter, except in cases of public utility, when the object of the Act appeared larger than the enacting words, which, it was said, was not then the case. The statute not only altered the common law, but, inasmuch as it created covenants for the party conveying, by mere implication, its tendency might be regarded as somewhat dangerous, and as calculated to entrap the ignorant and unwary; and the same principle was applied in a more recent case.⁴

conveying and assuring the said lands and premises, hereby conveyed or intended so to be unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs or assigns, his or their counsel in the law, shall be reasonably devised, advised, or required.

"§ 16. A covenant by any such grantor, 'that he has done no act to incumber the said lands,' shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered, any act, deed, or thing whereby the lands and premises conveyed or intended so to be, or any part thereof, are, or will be, charged, affected or incumbered in title, estate, or otherwise." Rev. Stat. of Virginia, 1849.

¹ Tit. 18, c. 1, § 20.

² 2 Alab. 541.

³ *Gee v. Pharr*, 5 Alab. 187.

⁴ *Clanch v. Allen*, 12 id. 164. When it is said in *Andrews v. McCay*, 8 id. 928, that "the statute covenant was broken when the deed was made, and the general covenant of warranty (which was also in the deed) by the evic-

In Mississippi, the section of the Pennsylvania Statute was copied in the Mississippi Statutes of 1832,¹ and re-enacted in the Revised Statutes of 1840.²

In *Weems v. M'Gaughan*,³ the Court gave no opinion as to the first of these implied covenants being limited to the acts of the grantor (though *Gratz v. Ewalt* was cited in the argument,) but decided the case on the ground that the express covenant of warranty which the deed contained did away with the implied covenants.⁴ "The covenants raised by law from the use of particular words in the deed, are only intended to be operative when the parties themselves have omitted to insert covenants. But when the party declares how far he will be bound to warrant, that is the extent of his covenant." The effect of this is of course to deny to a purchaser any covenant of seizin which the statute gives him when he has also received an express covenant of warranty, and under such circumstances it would seem that there could never be a recovery without an eviction.

tion under the sale," it is presumed the Court did not mean to say that the implied covenant for quiet enjoyment was broken as soon as made, so as (in the absence of a covenant of warranty) to deprive an assignee of a remedy on the statutory covenants, on the ground of its being a chose in action, and therefore not assignable. This is here mentioned because many of the cases say, generally, in actions on the implied covenant for seizin, and against incumbrances, "this was broken as soon as made," but no case will be found in which this has been said of the implied covenant for quiet enjoyment, when that covenant was the one sued upon.

¹ 13 June, 1832, c. 24, § 32.

² Chap. 34, § 32.

³ 7 Smedes & Marshall, 427.

⁴ This is correct when applied to the case of covenants contained in a conveyance of a term for years. In such case the covenant implied from the word of leasing is annulled by the insertion of an express covenant. *Nokes' case*, 4 Coke, 80; *Line v. Stephenson*, 5 Bing. N. C. but this was not the law as to the conveyance of a freehold.

In Missouri, the Revised Statutes of 1845,¹ declare that "the words grant, bargain, and sell, in all conveyances in which any estate of inheritance in fee simple, is limited, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor for himself and his heirs to the grantee his heirs and assigns. First, that the grantor was at the time of the execution of such conveyance seized of an indefeasible estate in fee simple in the real estate thereby granted. Second, that such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor or any person claiming under him. Third, for further assurance of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns, and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance." There were former Acts passed in 1804 and 1825,² from which this was altered. The second of these covenants is a limited one. The first and third are general. In a recent case³ the Court after a careful review of the English and Pennsylvania authorities, held that these three covenants were dis-

¹ Page 221.

² In the act of 1825, it was declared that "the words grant, bargain, and sell shall be adjudged express covenants for the bargainee or the grantee, his heirs and assigns, for the bargainor or grantor for himself, his heirs, assigns and administrators, that the bargainor or grantor was at the time of the execution of such deed, seized of an indefeasible estate in fee simple, in and to the lands, tenements, and hereditaments thereby granted, bargained, and sold, and that the same was then free from incumbrances done or suffered from the bargainor or grantor, his heirs and assigns, and all claiming under him; and also for further assurance thereof, to be made by the bargainor or grantor, his heirs and assigns, unless the same be restrained," &c. The Act of 1804 was identical with the Pennsylvania Statute.

³ *Alexander v. Schreiber*, 10 Missouri, 461.

tinct and independent. "The second may be superfluous, but it does not therefore limit the first, which is independent of and not inconsistent with it.¹ Of these, the covenant for further assurance is held to be the only one which can be taken advantage of by an assignee of the land.²

¹ See accordingly, *Collier v. Gamble*, 10 Miss. 471.

² *Collier v. Gamble*. In *Shelton v. Pease*, 10 Miss. 473, a purchaser took an express general covenant to warrant and defend against all titles, and particularly against a certain mortgage which had been executed by his grantor. He paid off this mortgage and then brought suit upon his covenants. It was, however, held by the Court that there was no breach of the covenant of warranty, and that the mortgage could not come within the scope of the statutory covenant against incumbrances, because the grantor having covenanted to warrant and defend against the mortgage, he could not be supposed to mean to covenant against its existence.

CHAPTER XI.

WHAT COVENANTS FOR TITLE A PURCHASER HAS A
RIGHT TO EXPECT.¹

It was not until towards the close of the seventeenth century, in England, that, with the comparative cessation of civil warfare, and the steady improvement and consequent increase in value of real estate, the law of Vendor and Purchaser began to assume that form which it has since substantially preserved; and as land became more the subject of transfer, its muniments of title were more readily yielded to the examination of the purchaser. But, however rigid this examination might be, and however willing courts of law and equity might be to carry out the principle, which, before the consummation of the contract, protects the purchaser's right to a title clear of defects and incumbrances, yet, while so doing, they also continued to recognize and enforce his right to covenants for the title.² The form and extent of these

¹ In England it has been held, that if the attorney of a vendor allow him to enter into an unusual covenant without explaining the liability thereby incurred, he is responsible for consequent loss, notwithstanding the vendor may, at the time, have been aware of the fact, in respect of which the liability on the covenant is incurred; *Stannard v. Ullithorne*, 10 Bing. 491; so it is said, an attorney for a vendee will be liable for not securing to him the covenants to which he would be entitled from the other party. *Dart on Vendors*, 258.

² "If," says Lord Eldon in *Church v. Brown*, 15 Ves. Jr., 263, "a man covenants to sell a fee simple estate, free from all incumbrances, and says no

covenants were, however, changed. Before that time it had not, in general, been thought too much for a purchaser to demand and receive covenants against the acts of all those claiming by title, that is, against the acts of all but mere trespassers.¹ But when the examination of the title became a matter of course, and vendors who brought their estates into the market were forced to comply with certain rules, which it was held the purchaser had a right to exact, it was naturally thought unreasonable that he should receive covenants of so wide a scope, and the extent of the covenants which a purchaser had a right to expect, soon became matter of regulation in England, and is now well settled.

“If a man purchase an estate of inheritance,” said Lord Eldon,² “and afterwards sells it, it is to be understood *prima facie*, that he sells the estate as he receives it, and the purchaser takes the premises granted by him with covenants against his acts. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and, at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor’s covenants against an act done by himself. But if the defect in his title depend upon the acts of those who had the estate

more, it is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all times been carried into execution in a form and mode which alter most materially, substantially, and importantly the effect of the mere conveyance.”

¹ See *supra*, page 147.

² *Browning v. Wright*, 2 Bos. & Pull. 23.

before him, and he honestly but ignorantly proposed to another person to stand in his situation, neither hardship or injustice can ensue. What is the common course of business in such case? An abstract is laid before the purchaser's counsel, and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not; and, if any doubt arise on the title, it rests with the vendor to determine whether he will satisfy these doubts by covenants more or less extensive. *Prima facie*, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs."¹

There is, however, an exception to the rule which denies to the purchaser unlimited covenants, and that is in case of a mortgage, in which, it would seem, a mortgagor always gives in England² unlimited cove-

¹ See, in accordance with this view, *Church v. Brown*, and two opinions in 2 Powell's Conveyancing, 206-9. The following remark of Mr. Fearne is taken from his Posthumous Works: "A vendor who purchased the estate himself should covenant only against his own acts and the acts of all claiming under him, where the title is well deduced, and the identity of the lands conveyed to him, and those sold by him, is apparent; but if the title of the vendor is questionable, he should covenant generally; and if the lands conveyed, owing to any alteration in them or otherwise, do not evidently appear, by the description of them in the purchaser's deed of conveyance, to be the same conveyed to the vendor, the vendor should further covenant that they are part of the estate conveyed to him by his vendor." A distinction noticed by Mr. Fearne, with respect to the detention of title deeds, is not only not applicable to a country where registries are universal, but, as Sir E. Sugden observes, is one never attended to in practice. It is, therefore, not referred to here.

² And, it would seem, sometimes in parts of this country. See *supra*, p. 348-9.

nants for the title, as those who lend money upon such security are accustomed to require every possible security for its repayment.¹ It has, moreover, been said, that in common leases, as the title is not inspected, the lessor should covenant against all persons whomsoever.²

Where, however, the vendor does not claim by purchase, in the popular signification of the term, that is, by way of sale, for a valuable consideration, a purchaser seems to be there entitled, as a general rule, to require covenants extending to the acts of the last person who thus claimed by purchase, "and this," says Sir E. Sugden,³ "is the universal and settled practice of conveyancers. For instance, if I sell an estate which was devised to me, and the devisor's father originally purchased the estate, the covenants for title are extended to the acts of the father."⁴

The object of English conveyancers, in thus obtaining covenants against the acts of all those not

¹ Williams on Real Property, 348; *Cripps v. Reade*, 6 Term. R. 606; 2 Sug. 427.

² Barton's Conveyancing, 75.

³ 2 Vendors, 453; Dart on Vendors, 260.

But such a rule has not always been adopted by the Court of Chancery. Lord Hardwicke once said, that he had never heard nor did he know of such a rule. "It would be unreasonable to extend the covenants to the first purchaser, when a family have been for several generations in possession of the estate, for they may have had the benefit of the statute of limitation, and other bars in their favor, and, therefore, carrying it no further back than the person under whom the present vendor claims, is sufficient." *Lloyd v. Griffiths*, 3 Atkins, 267; 3 Ves. Jr., 236; 14 id. 236.

⁴ So, it is said, where one claims under a voluntary settlement or conveyance, the covenants, when he sells, should be as extensive as in the case of descents, but if any of the family purchased the estate, then the covenants should only extend to the acts of such purchaser and those claiming under him. Barton's Conveyancing, 72.

actually claiming by purchase, is, that there may be no one in the chain of title against whose acts there is not a covenant.¹ But the rules which we have thus considered are applicable only to cases in which the vendor is himself the absolute owner of the subject of the contract, that is, unites in himself both the legal and the equitable estate; and these rules must, therefore, be considered as laying down the

¹ "Although in theory," says Sir E. Sugden, (2 Vend. 453), "a purchaser is entitled to a regular chain of covenants for title running with the land, and extending to the acts of the successive owners of the property, yet practically, he is entitled to no such thing, but must rest content with the covenants obtained by former owners, whether they run with the land or are collateral to it, and whether they keep up the chain of liability or leave it altogether broken and disconnected. This observation does not apply to the covenants for title to which a purchaser is entitled from his immediate seller." In "Humphreys on Real Property," a work not more remarkable for the concise and clear view of the actual law which it contains, than for the deficiency of the code by which the learned author proposes to remedy the evils he so pointedly shows to exist, he remarks: "The professed rule is, that there should be a chain of covenants throughout the title, connecting those of the alienor with those of the preceding owner who has last covenanted. To this rule, however, there are the following several objections of expediency and of precedent. First, such a qualified warranty never actually enters the contemplation of the contracting parties. Whoever acquires land at its full value, expects an equally complete or indefeasible title to it. The notion of concatenated fractions of an entire obligation, rendering the alienor answerable for the faults of the first link only, and then referring the alienee, for all prior defects to the exhausted assets of long-deceased strangers, is too revolting to suppose it would be accepted, as a guarantee, by any purchaser, to whom it was once explained. Should it be urged—You have the title to inspect, he would reply: Such are the complications of real property, and the inadequate means of search, that with all reasonable diligence, defects must often remain undiscovered, and a purchaser is not concluded by *latent* faults. Under the *Roman* law, the seller, on the eviction of the purchaser, was answerable to him for the loss, under certain qualifications, interposed for the protection of the former. The Code Napoleon, (1626—1840), in framing which both precedent and principle were fully discussed, (and the subject is a general one), imposes an absolute warranty on a seller, in case of eviction, to be answered in damages, the amount of which is chiefly regulated by the price, and by subsequent permanent improvements." Page 77.

ultimate limit, to which, in England, a purchaser may, as a general rule, expect his covenants for title to be extended. But there are many cases within this limit.

Vendors of real estate may be divided into three classes. The first class comprises those of whom we have been speaking, that is, vendors who sell estates to which they are legally and equitably entitled. The second class comprises those who may be termed fiduciary vendors, such as agents for sale, trustees, (either selling in pursuance of an express trust or a power), executors, (selling in exercise of a power express or implied, or under order of court), administrators, mortgagees with power of sale, assignees of bankrupts and insolvents, and the like. The third class may be said to be ministerial vendors, such as sheriffs, tax collectors, &c.

As respects this last class of vendors, it is obvious that no covenants whatever should be demanded.¹ There is, moreover, a manifest and proper difference between the first and second classes of vendors, as to the covenants to be exacted from them, and certain rules are, upon this point, well settled, as well in this country as in England.

The rule may be said to be a general one, with respect to fiduciary vendors, who have either no interest in the subject of the sale, or have a naked legal title, that the purchaser is entitled to no covenants but that the vendor has not done, permitted, suffered, or been party or privy to any act whereby to "incumber, charge, prejudice, affect, or impair"

¹ *Mont v. Allegre*, 9 Wheat. 616; *Friedly v. Scheetz*, 9 Serg. & Rawle, 156; *Lowden v. Robertson*, 5 Blackford, 276; *Rocksell v. Allen*, 3 M'Lean, 357.

the estate; as it is evident that few persons could be found to act in a fiduciary or representative capacity, if they were compellable to enter into covenants of greater scope.¹

But although covenants cannot be demanded from a fiduciary vendor, yet it has been the practice in England for the purchaser to insist on covenants from the parties beneficially interested in the purchase money, at least in the case of *cestui que trusts*.²

The practice of the profession, however, as to this point, was not for many years enforced or even recog-

¹ The rule with respect to trustees and executors may be found in *Staines v. Morris*, 1 Ves. & Beames, 10; *Worley v. Frampton*, 5 Hare, 560; *Grantland v. Wight*, 5 Munford, 295; *Allen v. Winslow's admr.* 1 Randolph, 76; *Ewins v. Leach*, 1 Iredell's Eq. R. 416; and *Summer v. Williams*, 8 Mass. 201; and with regard to assignees, in *Wilkins v. Fry*, 1 Merivale, 208; *White v. Foljambe*, 11 Ves. 345.

It is presumed, however, that where the vendor had an interest, as well as a power, he would always be obliged to covenant personally to the extent of that interest. *Barton's MSS.* It might be thought reasonable that fiduciary vendors should covenant for further assurance, but it has been recently settled that this cannot be exacted of them. *Worley v. Frampton*, 5 Hare, 560. It has, however, been held, that if trustees under a will come into equity to compel specific performances by the vendee of a contract made with their testator as vendor, they will be compelled to covenant for the title in the same manner as he was to have done. *Page v. Brown*, 3 Beavan, 36.

² "It always has been, and still is, the practice of the profession," says Sir E. Sugden, 2 Vendors, 454, "to make all the *cestui que trusts*, whose shares of the purchase money are in any wise considerable, join in covenants for the title, according to their respective interest." "A bankrupt," he continues, "is always made a party to the conveyance of his estate, to meet the difficulty which the purchaser might otherwise be put to in maintaining and proving the title, and the bankrupt is generally made to enter into covenants for title, in the same manner as he would have done had he sold the estate while solvent." It seems, however, that the bankrupt cannot be compelled to do this, and his concurrence is rather matter of favor than of right; *Waugh v. Land, Cooper*, 134; *Sugd. Concise View*, 433; and it is apprehended that this would equally apply to conveyances made by assignees for the benefit of creditors, under insolvent laws.

nized by the Court of Chancery,¹ and it has not been until recently that it has received judicial approbation.² The correct test, however, of the application of such a rule seems to be the extent of the purchaser's liability to see to the application of the purchase money.³

¹ The practice was condemned by Lord Loughborough in *Wakeman v. The Duchess of Rutland*, 3 Ves. 233, 504, affirmed on appeal, 8 Brown's Par. Cas. 145. The decision was, however, against the opinion of the most experienced conveyancers of that period, and is, says Sir E. Sugden, "by no means an authority that *cestui que trusts* of money to be produced by the sale of estates devised to trustees to sell, cannot in any instance be required to covenant for the title. Where the money to arise by sale of the estate, is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title. So even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestui que trusts* must, it is conceived, covenant for the title."

It may, moreover, be observed that *Wakeman v. The Duchess of Rutland*, was to some extent against the views expressed by Lord Hardwicke in *Lloyd v. Griffiths*, 3 Atkins, 264, which case is, however, criticized by Mr. Platt, who says it appears to have been decided "rather with reference to particular circumstances than from any general principle." Platt on Covenants, 392.

² In the case of the London Bridge Acts, 13 Simons, 176, lands were devised to A for life, remainder to B for life, remainder to his sons successively in tail male. A and B during the infancy of B's eldest son obtained an Act of Parliament vesting the estate in trustees in trust to sell, and the Vice Chancellor "apprehended that where the only persons who were immediately interested in the estates were tenants for life, it was the usual course to make them covenant for the title—that the tenants for life in this case stood in the same situation as if there had been a power to sell the estates with their consent, in which case it would be a matter of course for them to enter into the covenants."

³ Sir E. Sugden says, "Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, etc., and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took £5 might as well be required to covenant, as one who took a large sum. The same rule applies *ex necessitate* where an estate is sold for similar purposes under an order of a Court of Equity. If a different rule prevailed, the consequence would be, that the estate could never be sold by decree, till

It is a familiar rule that, in general, when parties contract *en autre droit*, and bind themselves personally, and fail to bind their principals, they are to be held personally responsible,¹ this rule applying *à fortiori* to contracts under seal. This general principle was applied in England, in *Appleton v. Binks*,² where one who covenanted on behalf of another, to pay the purchase money of certain property, was held personally liable; the Court holding that it was impossible to contend that where one covenants for another he is not to be bound for it, and the covenantee might prefer the security of the covenantor to that of his principal.³

In this country it has frequently happened that fiduciary vendors have, either from inadvertence or design, entered into covenants for title of greater scope than we have seen the law exacts of them, and in such cases it is well settled that the covenants are personally binding upon them.⁴ Thus where the grantors

the account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled; but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for sale, without calling on the parties who are presumptively beneficially interested."

There would seem to be reason why in America *cestui que trusts* should not be compellable to enter into covenants for title, which is, that the English doctrine which in some cases at least, obliges the purchaser to see to the application of the purchase money, appears to be less regarded here, (see note to the case of *Elliot v. Merryman*, *White's Leading Equity Cases*, 73,) and the purchaser therefore is in less need of these covenants as a protection against the future claims of the parties beneficially interested; though as regards claims under an adverse paramount title, it is obvious that this reason cannot apply.

¹ Story on Agencies, § 263, &c.

² 5 East. 148.

³ See to the same effect, *Burrell v. Jones*, 3 Barn. & Ald. 47; *Kennedy v. Gouveia*, 3 Dow. & Ry. 503; *Norton v. Herron*, 1 Car. & Payne, 648.

⁴ *Sumner v. Williams*, 8 Mass. 162. There had been previous cases in

“in their capacity as administrators,” covenanted that they, administrators as aforesaid, were lawfully seized of the premises, that they were clear from all incumbrances except a certain mortgage and a right of dower, that they had in their said capacity good right to sell, and that as administrators as aforesaid, they would warrant and defend the premises, it was held that the covenantors were personally bound to pay out of their private estates, damages arising from an eviction of the covenantees. There could be no doubt, it was said, that the grantors did not intend that there should be any recurrence to themselves, and that they observed peculiar caution to avoid any idea of personal liability; and further, that the nature of the transaction, the character in which the grantors contracted, and the language of the instrument, concurred in proving that such was the intention of both parties; while at the same time it must be confessed equally clear that both parties believed that the covenants were to be effectual in case of an interruption of the estate supposed to be granted, though probably neither of them contemplated the happening of such a contingency. On the occurrence of that contingency, however, the Court was reduced to the alternative of pronouncing the covenants to be void, and wholly ineffectual, or of giving them operation against the defendants in their personal and individual capacity, and however hard the alternative might be, in subjecting the administrators to the payment of damages contrary to their intention, still it was said that the principle was one too deeply rooted to be un-

Massachusetts, to the same effect. *Thatcher v. Dinsmore*, 5 Mass. 299; *Foster v. Fuller*, 6 id. 59.

settled. It was, moreover, well remarked, that while an administrator was not required by any duty of his office or trust, to enter into a personal covenant for the perfection of the title, or for the validity of the conveyance, beyond his own acts, yet it would be admitted that he was at liberty to do so if he chose thus to excite the confidence of purchasers and to enlarge the proceeds of the sale, and that he might be competent to engage his own credit collaterally in the conveyance. The rule thus stated is supported by a current of authorities, and by well established principle.¹

¹ Duval v. Craig, 2 Wheaton, 56; Stinchfield v. Little, 1 Greenl. 231; Mitchell v. Hazen, 4 Connect. 485; Belden v. Seymour, 8 id. 24; Whiting v. Dewey, 15 Pick. 433; Godley v. Taylor, 3 Dev. 178; Mason v. Caldwell, 5 Gilman, 196; Donahoe v. Emory, 9 Met. 66.

It has, however, been held that where the covenantor expressly declares that his liability shall be no more than co-extensive with his fiduciary capacity, he will not be personally bound, even although the covenants carry with them no protection whatever to the covenantee. Thus in Thayer v. Wendell, 1 Gallison, 16, Mr. Justice Story held that a covenant by an executor in his "capacity of executor and not otherwise," created no personal liability, and that no man acting fairly and openly *in alieno jure*, and not otherwise, can be made answerable in his private capacity upon the contract. So where in Ohio, Day v. Browne, 2 Hammond, 347, the covenant was that the grantors would warrant and defend "as executors are bound by law to do, the distinction was taken that in the cases above referred to, the word executor, trustee, etc., amounted only to matter of description, but that as executors were not bound in that State to warrant at all, the words were used to qualify their responsibility. So in Kentucky, Manafee v. Morrison, 1 Dana, 208, where executors covenanted to warrant "to the extent of their assets," it was held that the covenant imposed no obligation on them individually, nor beyond the assets in their hands at the time of eviction.

The distinction between these two classes of cases seems to be, that in the former, although the intention of the covenantor may impliedly appear to be that he intends his covenant not to bind himself personally, yet that unless this intention be manifested by the most express, unequivocal language, a false confidence of security may be excited on the part of the purchaser, and the rule applies that the words of the instrument are to be taken most strongly against the party using them; but when the covenantor expressly limits this liability, no such confidence is or ought to be raised, and the cove-

It will be found difficult and perhaps impossible to determine by general and precise rule what in this country are the covenants which a vendor is obliged to give, and a purchaser has a right to demand.¹ Owing to various causes, the practice of conveyancing differs widely on the opposite sides of the Atlantic.² It is obvious, moreover, that many of the usages of conveyancing which prevail where the state of society has for a long time been permanent, the titles old and to a greater or less extent carefully examined at every purchase, lose their application in a comparatively new country. The same covenants which might satisfy a purchaser in England or Massachusetts, might not satisfy a purchaser in Texas or California. As precision of conveyancing increases with the steady rise of property, and as the titles become better known, a purchaser is less anxious for general covenants than where he buys in comparative ignorance of the title, and relies upon such covenants for his protection.³ Hence, the greatest difference will be found to exist between the law and practice on this point, not only on the different sides of the

nantee by acceptance of such a covenant cannot draw from it a greater protection than its express terms permit.

¹ It was held by Lord Tenterden at *Nisi Prius*, *Bennet v. Womack*, 3 Car. & Payne, 96, and subsequently by the Court of King's Bench, on a motion for a new trial, 7 Barn. & Cress. 627, that the question of what were the "usual covenants" which a lessor might exact of his lessee as to payment of the rent, &c., was one for the jury upon the evidence; and it is apprehended that the same rule must be applied on both sides of the Atlantic to the question, what are the usual covenants for title? See also note to *Henderson v. Hay*, 3 Bro. Ch. R. 632.

² The absence of a general system of registration may be said to be one of the principal of these causes. The vexatious questions which hence arise in England as to the purchaser's right to a production of the vendor's prior title deeds, are unknown in this country.

³ See the remarks of Huston, J., in *Whitehead v. Carr*, 5 Watts, 369, and Spencer, J., in *Pitcher v. Livingston*, 4 Johns. 14.

Atlantic, and between different States, but even between different parts of the same State.

In Pennsylvania the Supreme Court have laid it down as a general rule, that a purchaser has no right to expect covenants of greater scope than against the acts of the vendor and his heirs, and that an agreement to convey by a warranty deed, means in popular phrase, a deed with special warranty,¹ while at the same time it is held that no suspicion of the title can properly arise should the deed contain general covenants.²

In the larger towns of that State, and certainly in Philadelphia, it is believed, that in ordinary cases, a covenant of warranty, limited to the acts of the vendor and his heirs, and, perhaps, in some instances, carried back to the last person claiming by purchase, is the only express covenant for title inserted in the conveyance, and this coincides with the rule of the Supreme Court. In some of the counties, however, it is believed that a purchaser generally expects, and a vendor rarely hesitates to give a covenant of general warranty, as it seems to be sometimes thought that

¹ Withers v. Baird, 7 Watts, 229; Espy v. Anderson, 2 Harris, 312.

² Cresson v. Miller, 2 Watts, 276; Forster's Executors v. Gillam, 1 Harris, 343.

"General warranties," said Gibson, Ch. J., in Cresson v. Miller, "are taken *ex abundante cautela*, and not because the purchaser had the least reason to suspect that the title was defective. A purchaser taking a deed with a general warranty, forms not the slightest presumption that the title he received was doubtful, or that he knew it to be such. The idea seems to be, that if he fails to recover the land he has his remedy over against the vendor; and that, therefore, he can be in no better situation than the vendor. It is apparent, however, that in a great majority of instances, a vendee cannot obtain adequate relief. Without insisting upon the occasional insolvency of the vendor, he cannot be compensated for the increased value of the land, arising from his industry and skill, or from the employment of his capital in erecting valuable improvements on the premises."

if the latter is only willing to covenant against his own acts, he must know there is something defective about the prior title.

In Kentucky, it was held, from an early day, to be both the settled rule and the practice in that State, that unless where there was a special contract to the contrary, a covenant of general warranty must be given;¹ and such seems to be still the rule.² So in Indiana, a bond conditioned "for making a lawful title" was held to require a general warranty,³ although

¹ *Steele v. Mitchell*, Kentucky Decisions, 47. As this volume of reports is believed to be extremely rare, the following extract is inserted from the opinion of the Court in this case. "Where a conveyance is to be made, for a valuable consideration of a general nature, a warranty is universally held to be an essential part of the deed or assurance; and unless in those cases, where it is otherwise provided by special contract, a general warranty is as universally expected. It need not be observed, that this opinion and expectation is certainly authorized by the general principles of justice, as well as by the universal custom of this county, and that from which we derive most of our legal precepts. The appellee was only willing to convey with special warranty, and the appellant refused to accept a conveyance without general warranty. Then the only question of consequence which arises in the suit is, what is the rational import of the words of this bond, (which was conditioned to make a deed for the premises), relative to the matter in dispute. . . . This Court is of opinion, that to comply with the legal intent of the bond in question, such a deed, as is customary in like cases should be made; that is to say, a deed with general warranty; and consequently, that the District Court erred in decreeing a deed with only special warranty. This opinion is supported by the doctrine on warranties, which has been suggested; and is further confirmed by the maxim, that the words of every one's obligation shall be taken most strongly against himself. To which may be added that reason seems to dictate, that when any person means to limit his contract in the sale of lands, it is his business to have it expressed; otherwise the presumption ought to be that he undertakes to make a good title, or a deed which will insure the land, or its value, to the purchaser."

² *Fleming v. Harrison*, 2 Bibb, 171; *Vanadah v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 528. In *Slack v. Thompson*, 4 Monroe, 462, the express agreement was to give a covenant of quiet enjoyment, "without any trouble or molestation whatever," and the terms of the agreement would of themselves have been sufficient to prevail even against an opposite usage to the contrary.

³ *Clark v. Redman*, 1 Blackf. 879.

not, it would appear, a covenant for seizin or for quiet enjoyment.¹ So where in Ohio it is said,² that "a contract for a good and sufficient deed means a deed with a covenant of warranty," it is presumed that a general warranty is meant; and this may, perhaps, be said to be the rule in some of the States more recently admitted into the Union, and where the titles are comparatively newer.³ But it is probable, that with the increase of care in the examination of titles, the purchaser's right to unlimited covenants will be narrowed.⁴

In a recent case in the Supreme Court of the United States,⁵ Mr. Justice Story referred to a deed with special warranty only, as being "a significant circumstance," in affecting a purchaser with notice of a paramount title.⁶ But there would seem to be equal reason in the opposite argument, that a deed with general warranty was as significant a circumstance—that unless there had been something wrong about the title, the purchaser would not have de-

¹ *Kirkendale v. Mitchell*, 3 M'Lean, 146.

² *Tremaine v. Lining*, Wright, 644.

³ There the remark of Spencer, J., in *Pitcher v. Livingston*, 4 Johns. 14, may apply that it was rare for the purchaser to investigate the seller's title, and that he mostly relied upon his covenants.

⁴ In Virginia, however, the reverse of this seems to be the case, as in an early case, (*Pennington v. Hanby*, 4 Munf. 144), it was held that a purchaser was entitled only to covenants against the acts of the vendor and those claiming under him; while in *Rucker v. Lowther*, 6 Leigh, 259, a different opinion was expressed. In one case in New York, *Fuller v. Hubbard*, 6 Cowen, 22, it was held that an agreement to convey in fee simple did not require any covenants; "A conveyance is good and perfect without warranty or personal covenants." If by this is meant that by the ordinary rules of the law of vendor and purchaser, no covenants whatever are required under such an agreement, the authority of this case may be questioned.

⁵ *Oliver v. Piatt*, 3 Howard, 410.

⁶ Such also seems to have been thought in *Woodfold v. Blount*, 3 Heyward, 147.

manded a general covenant, and that he intended to run the risk of the defect, and rely on the covenant for his protection. It is apprehended, however, that neither of these positions are tenable, and that no presumption of notice can properly arise, either from the presence or the absence of general covenants.

But whatever may be the local usage on this point, it will be always subject to be controlled by the express terms of the articles of sale. Owing to the looseness of manner in which these articles are often expressed, questions have even arisen as to whether the contract was not substantially complied with by the tender of a deed containing covenants for title, although the title itself might be defective. Thus, in *Gazley v. Price*,¹ the Supreme Court of New York held, by Spencer, J., that an agreement "to give a good and sufficient deed for the premises," related merely to the validity and sufficiency of the conveyance in point of law, to pass whatever estate the vendor had; and in the subsequent case of *Parker v. Parmele*,² a similar construction was given to a contract to give "a good warranty deed of conveyance of the land." So in a late case in Massachusetts,³ where the agreement was to give a good and sufficient warranty deed of the premises, it was held, that "the words 'good and sufficient' relate only to the validity of the deed, and do not imply that the title was valid or that it

¹ 16 Johns. 267.

² 20 Johns. 132.

³ *Tinney v. Ashley*, 15 Pick. 552. The Supreme Court of Massachusetts seemed disposed to take the same view of the law in an early case, *Aiken v. Sanford*, 5 Mass. 499, though it was said in that case, as in *Swan v. Drury*, 22 Pick. 489, and *Tharin v. Fickling*, 2 Richardson, 364, "that if the money was to be paid on receiving the deed, it might be a reasonable construction that a good and sufficient title should be conveyed."

was free from incumbrance. To guard against any defect of title, a covenant of warranty was provided for, which shows clearly that the agreement was so understood by the parties."

But the decisions in New York are opposed both to prior and to subsequent authorities in the same State, based upon articles substantially similar. Thus, in the early case of *Clute v. Robinson*,¹ it was held by Mr. Chief Justice Kent, that an agreement to execute a good and sufficient deed for the premises, did not mean merely a conveyance good in point of form. That would be a conveyance without substance; but it meant an operative conveyance, one that carried with it a good and sufficient title to the land conveyed;² and in a comparatively recent case,³ Mr. Chancellor Walworth was clearly of opinion that "an agreement to convey land by a good and sufficient warranty deed, was not complied with by the mere giving of a warrantee deed where the grantor had no title to the land, or when his title was imperfect. It must be a deed good and sufficient, both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed;"⁴ and these principles are undoubtedly sustained by the weight of authority,⁵ and some of the cases which

¹ 2 Johns. 413.

² So in *Jones v. Gardiner*, 10 Johns. 266. These remarks were approvingly quoted by Van Ness, J., in delivering the opinion of the Court, in *Judson v. Wass*, 11 Johns. 528.

³ *Everson v. Kirtland*, 4 Paige, 638.

⁴ So in *Carpenter v. Bailey*, 17 Wend. 244; *Traver v. Halstead*, 23 Wend. 66; see *Winne v. Reynolds*, 6 Paige, 411.

⁵ *Dearth v. Williamson*, 2 Serg. & Rawle, 498; *Colwell v. Hamilton*, 10 Watts, 415, (where is a very able opinion of Mr. Justice Kennedy); *Porter v. Noyes*, 2 Greenl. 22; *Brown v. Gammer*, 14 Maine, 276; *Hill v. Hobart*, 16 Maine, 164; *Stow v. Stevens*, 7 Verm. 27; *Lawrence v. Dole*, 11 id.

seem to be not in harmony with others, may, perhaps, be reconciled by reason of the express and peculiar words of the contract.¹

There is, indeed, a guiding principle to the construction of all these cases, which may be briefly referred to. It is familiar law that the general principles of the contract of sale, both in this country and in England, recognize and enforce, while it is still executory, the right of the purchaser to a title clear of defects and incumbrances. This right is one, not growing out of the agreement of the parties, but one

549; *Mitchell v. Hazen*, 4 Connect. ; *Brown v. Starke*, 3 Dana, 318; *Tarwater v. Davis*, 2 English, 153; *Clark v. Redman*, 1 Blackf. 379; *Pugh v. Chesseldine*, 11 Ohio, 109; *Hunter v. O'Neil*, 12 Alab. 37; *Greenwood v. Ligon*, 10 Sm. & Marsh. 615; *Feemster v. May*, 13 id. 275; *Little v. Paddleford*, 13 New Hamp. 167, (settling the doubt suggested in *Beach v. Steele*, 12 id. 89;) *Gilchrist v. Bine*, 1 Dev. & Bat. Eq. 346; *Watts v. Waddle*, 1 M'Lean, 200. (For several of these authorities I am indebted to the note to page 150 of Mr. Perkin's edition of Sugden on Vendors, which has appeared while these sheets are going through the press.) In New Jersey, the early case of *Johnson v. Smock, Cox*, 107, was decided in accordance with the earlier cases in New York, but in *Barrow v. Bispham*, 6 Halst. 119, the Court approved of the decision in *Gazley v. Price*, and *Parker v. Parmele*. When the question was again presented in the recent case of *Tindell v. Conover*, 1 Spencer, 214, Nevius, J., after saying that the Court took a rational and correct view of the question in *Barrow v. Bispham*, by holding, that unless there was something else in the instrument, or attendant circumstances to show that the parties by the *deed* meant *title*, the Court had no right to say the former word meant the latter, adds, "If this were entirely an open question in this Court, I confess I should strongly incline to adopt the construction given by Judge Kent and the Court of Errors in *Clute v. Robinson*. . . . I undertake to say, that in a written contract for the sale and purchase of lands, the expression, 'a good and sufficient warranty deed,' will be understood by more than nine-tenths of mankind, not excepting the legal profession, to mean a good and sufficient title;" and when this case came again before the Court in *Tindell v. Conover*, 1 Zabriskie, 654, the question was decided in accordance with the many authorities just cited. See the *New Barbadoes Toll Bridge Co. v. Vreeland*, 3 Green Ch. 157.

¹ Thus, an agreement to convey all the vendor's interest in a certain lot, "meaning the same interest which was deeded to him by P." was held to bind the vendor only to a conveyance of that interest. *Babcock v. Wilson*, 17 Maine, 372.

which is given by the law,¹ and it naturally follows, that a court of equity will not decree the specific performance of a contract where the title is bad, or even, as it has been said in modern times, where it is doubtful.² Hence, when an incumbrance exists, which it

¹ *Souter v. Drake*, 5 Barn. & Adolph. 999, per Denman, Ch. J.; *Doe v. Stanioon*, 1 Mees. & Welsb. 701; 2 Sugd. 2.

² The rule in equity as to not compelling a purchaser to take "a doubtful title," was said in *Marlow v. Smith*, 2 Peere Wms. 201, to be as old as Sir Joseph Jekyl's time, and in *Slope v. Fish*, 2 Ves. & Beames, 149, it was said to have been repeatedly acted on by Lord Hardwicke. *Shapland v. Smith*, 1 Brown's Ch. R. 75, is, however, generally cited as the leading case, although there was there but an expression of Lord Thurlow, that "if the title was only doubtful, he would not oblige the purchaser to take it." Of that case, Mr. Chief Baron Eyre, (before whom, while sitting for the Chancellor, it had been originally heard), remarked, in *Gale v. Gale*, 2 Cox, 145, that "there could be no such thing as a doubtful title in a court of justice—it must either be right or wrong, and the thickness of the medium through which the point was to be seen, made no difference in the end. The Court might have some difficulty in clearing it, but at last the point must be taken as equally certain as if no such difficulty had existed, for which reason, in the case of *Shapland v. Smith*, he had not felt the force of these cases, in which it had been said that a purchaser should not be compelled to take a doubtful title." See the remarks of the same judge in *Cooper v. Denne*, 4 Brown's Ch. R. 88; also reported in 1 Ves. Jr. 565; Lord Eldon said also, in *Vancouver v. Bliss*, 11 Vesey, 465, that he "recollected the period when it was the office of the Court to decide, whether the title was good or not, and it was thought better, that the dry rule should prevail, that, if the title was good, the purchaser should take it, than that the Court should speculate upon the point, whether there was more or less difficulty in the title; and say in one case, he should take it; in another, he should not. The old course was, that if the parties were afraid of the decision, they appealed, and had not a title absolutely indefeasible, but as good a warranty as could be procured. The departure from that course has been attended with great mischief. The first instance is the case of *Shapland v. Smith*, in which the single question between Baron Eyre and Mr. Hett was, whether there was a use executed or not; and the case sunk down into this state, that with so much difficulty upon the title, a purchaser should not be compelled to take it. That case has been followed since. What is the consequence? It is scarcely possible to represent the difficulties that have arisen from it; especially in a period when persons, under the description of land-jobbers, are going about looking for these things, and persons improvidently enter into contracts with them. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained

was not agreed upon should enter into and form part of the consideration, the vendor must dis-

upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections; but, if he finds he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is, that the abstract goes to some one for the express purpose of finding out objections, and opinions are given on both sides. I feel great concern for the owners of this sort of property. The consequence is, not only the misery arising from the uncertainty, whether that, which they have been enjoying with happiness, and upon which their families are to subsist, is their property; but it is an invitation to all, who may fancy they have an interest in it, to make an attack. There cannot be much doubt, therefore, which is the best rule, but the course which now prevails has been established so long, that I have not authority to alter it." See *Stapylton v. Scott*, 16 Ves. 274; *Biscoe v. Perkins*, 1 Ves. & Beames, 493; *Sloper v. Fish*, 2 id. 149. A valuable note on this subject by Mr. Hovenden, will be found appended to the case of *Cooper v. Denne*, 1 Vez. jr. 567.

In *Dalzell v. Crawford*, 1 Parson's Equity Cases, 45, the following language of King, P. J., is characterized by his usual clearness and force. "The specific execution of a contract in equity is not of absolute right in the party asking it, but of sound discretion in the Court. Hence it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance: 2 Story, 78, 79; *White v. Damon*, 7 Vesey, 85. In *Clows v. Higginson*, 1 Vesey & Beames, 526, it is said by the Vice Chancellor to be a plain and obvious principle, that a Court of Equity is not bound to interpose by specifically performing the contract. And although the subject and import of the written contract are clear, so that there is no necessity to resort to evidence for its construction, yet if the defendant can show any circumstances, *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information on the subject, will not interpose. This discretion is not, however, arbitrary, but exercised in a judicial manner according to established rules: 3 Atk. 187; 18 Ves. 111.

As a natural result of this doctrine, has arisen that of marketable titles. A marketable title in equity is one in which there is no doubt involved, either as to matter of law or fact; and such a title will a purchaser be compelled to accept: *Atkinson*, 3. It seems that a court of equity has no power in suits for specific performance, except on the application and consent of all parties to direct an issue for the determination of a matter of fact; nor can it, without such an application or consent, direct a case or an action for the purpose of satisfying itself on a matter of law: *Roake v. Kidd*, 5 Ves. 647; *Prebole v. Boghurst*, 1 Swint. 320; *Sharp v. Adcock*, 4 Russ. 375. Hence, if doubts arise, either as to fact or law, involved in the title, and the

charge it before he can call for a completion of the sale.¹

The law then recognizing, *prima facie*, a necessary implication of a good title in every contract for the sale of real estate, it follows, that an agreement by which such a settled rule is to be disregarded, should be couched in the most express terms, and as the law

purchaser be an unwilling one, as his consent cannot, of course, be had to an issue on the case, the Court is deprived of the only competent means of informing its conscience, and is placed in the dilemma, either to take upon itself the decision of the fact or the law, which it would do at the hazard of what might be afterwards determined in a court of law, or to refuse to interfere on behalf of the vendor; an alternative it is entitled to choose on the principle that a bill for specific performance of a contract, is an application to the discretion of the Court, and a decree, therefore, cannot be claimed as a matter of right: Atkinson, 9. In illustration of this doctrine, Lord Eldon, in *Stapleton v. Scott*, 16 Ves. 272, remarks, that 'it has been held repeatedly that though, in the judgment of the Court, the better opinion is, that a title can be made, yet if there is a *considerable, rational doubt*, the Court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law.' This distinction between good and marketable titles seems peculiar to courts of equity, being unknown in courts of law, where the question is simply, is the title good or bad: *Romilly v. James*, 6 Taunt. 274; 1 Marshall, 592. The equity doctrine seems to involve this result, that no title will be forced on a purchaser which is not so free from difficulty as to law and fact, that on a re-sale an unwilling purchaser shall be unable to raise any question which may appear to a judge sitting in equity, so doubtful that a title involving it ought not to be enforced. These are settled doctrines of English equity, and seem to necessarily arise from the constitution of strictly equitable tribunals. The urgent powers of these tribunals ought never be applied, *in the exercise of any discretionary jurisdiction*, where doubts prevail as to the perfect soundness of the plaintiff's claim; or apparent justice characterizes the defendant's objections. The refusal to interfere does not absolutely repudiate the plaintiff's rights, if any he can establish. It only denies to him an extraordinary remedy, properly applicable only to cases in no respect equivocal.

"The doubts, however, which will operate on a court of equity, are not doubts made up for the occasion; not based on captious, frivolous, and astute niceties; but such as produce real *bona fide* hesitation in the mind of the Chancellor. The doubts must, in the language of Lord Eldon, be 'considerable and rational,' such as would and ought to induce a prudent man to pause and hesitate in the acceptance of a title affected by them."

¹ 2 Sug. 419.

further recognizes the purchaser's right to covenants for the title, it is difficult to perceive how an agreement to convey "by a sufficient warranty deed," or words of similar import, can weaken the agreement which the law implies from the relation of vendor and purchaser.

CHAPTER XII.

WHO ARE BOUND BY, AND WHO MAY TAKE ADVANTAGE OF
COVENANTS FOR TITLE.

It is proposed in this Chapter to consider in the first place, who are bound by the covenants for title; or in other words, what are the liabilities arising under them of the covenantor, the heir, the devisee, the executor or administrator, and the assignee; and secondly, who may take advantage of them, or the rights arising under them of the covenantee, the heir, the devisee, the executor or administrator, and the assignee.

1. Of the covenantor. The liability of a covenantor depends of course upon the nature of the covenant into which he has entered, and upon many other circumstances which have been referred to in former pages. Nor is there any difference between covenants for title and other covenants as to liability by reason of their being joint, or joint and several, or several only.

Questions have at times arisen as to the liability of a married woman under covenants for title entered into by her jointly with her husband, in a conveyance of her estate. The general principle undoubtedly is, that a woman shall not be bound to answer in damages for any contracts made by her during coverture. But there was, it would appear, a distinction observed

as to her covenants for title in a fine, it having been held in an early case,¹ that if a husband and wife grant land belonging to the wife, by fine, with a covenant of warranty, an action will lie against her after the husband's death in case of the grantee's eviction.²

This decision may be accounted for by the high and solemn nature of a fine, being a proceeding of record, in the face of a court, whose judges were supposed to watch over the rights of the wife.³ But in this country, where the wife's interest is in general passed by a less solemn form of assurance, and even in England, since a recent statute⁴ has abolished fines, and substituted the more simple acknowledgment upon private examination, which prevails in this country, the opinion seems to prevail that no rule of law exists by which a married woman can be bound to answer in damages by reason of the covenants for title entered into by her jointly with her husband, although her estate may have passed by a proper acknowledgment.⁵

¹ *Wotten v. Hele*, 2 Saunders, 180, S. C. 1 Mod. 291.

² Though the case was stated to be one of the first impression, the judges "all thought that the action will lay against the defendant on her warranty in the fine, although she was *covert baron*, and they did not make any scruple of it." In *Greenwood v. Tiber*, Cro. Jac. 563, "all the reservations, covenants, and warranties," comprised in a lease made by husband and wife of lands of the latter were held good after the death of the husband, and acceptance of rent by the wife, "and the lessees and lessors bound by them;" though in this case it may be said that inasmuch as the wife was at liberty after her husband's death to disaffirm the lease if she had thought proper to do so, yet that she reaffirmed it by her acceptance of rent, and this point was, in the argument in *Wotten v. Hele*, "agreed by the counsel on both sides," so that this case can hardly be said to be an authority for the broad assertion that a wife will be bound by her covenants for title.

³ 2 Inst. 515.

⁴ 3 & 4 William IV. c. 74.

⁵ "The doctrine," says Mr. Chancellor Kent (2 Com. 167,) "that a wife can be held bound to answer in damages after her husband's death, on her cove-

2. Of the heir. The liability (whether immediate or ultimate) of the heir by reason of his ancestor's

nant of warranty, entered into during coverture, is not considered by the courts in this country to be law; and it is certainly contrary to the settled principle of the common law, that the wife was incapable of binding herself by contract." In case no such acknowledgment accompanied the conveyance, the covenants would be, as to her, absolutely void. *Sumner v. Wentworth*, 1 Tyler, 43, (though in that case the decision seems to have been put upon the ground of the wife not having properly acknowledged the deed,) *Sawyer v. Little*, 4 Verm. 414; *Wadleigh v. Gaines*, 6 New Hamp. 17; *Fowler v. Shearer*, id. 21; *Colcord v. Swan*, 7 Mass. 291; *Jackson v. Vanderheyden*, 17 Johns. 167; *Martin v. Dowelly*, 6 Wend. 1; *Aldridge v. Burlinson*, 3 Black. 201; "She may be influenced or persuaded," said Parsons, Ch. J., in *Fowler v. Shearer*, "by her husband to execute the deed with him, knowing its effect as an alienation; but she may not know the nature or effect of the covenants contained in it. And to hold her liable on the covenants cannot be necessary to the conveyance, nor be beneficial to her family; but may be greatly to her prejudice." The usage therefore has never extended to make her liable to an action on the covenants in the deed, further than they may operate by way of estoppel, and even this latter effect has been frequently denied. *Jackson v. Vanderheyden*, 9 Johns. 167; *Den v. Damarest*, 1 Zabriskie, 541; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; See *supra*, page 335. In Virginia, however, this doctrine was denied in *Nelson v. Harwood*, 3 Call, 342, where a specific performance of a wife's covenant for further assurance was decreed, on the ground that as all objections arising from supposed want of freedom of will on the part of the wife are removed by her private examination, her deeds are as binding upon her as if she were feme-sole. But it seems not to have been generally supposed, even supposing the case of *Wotten v. Hele* to be sound law, (which we have no right to doubt when we consider the solemn nature and the peculiar effect of a fine at common law,) that a similar effect was to be given to the more modern acknowledgments. The local statutes regulating those in the different States generally, allow, it is believed, such acknowledgments to have the same force and effect as to *passing the estate* as a fine, but not the same force and effect generally. If in any States these acknowledgments are endued with this sweeping efficacy, the doctrine held in *Wotten v. Hele* would appear to give effect to the wife's covenants for title. It is worthy of notice, moreover, that the effect of *Nelson v. Harwood* was subsequently completely destroyed by a legislative enactment in that State to the effect "that no covenant or warranty contained in any deed executed hereafter by any *feme covert* shall in any manner operate upon her or her heirs further than to convey effectually from such *feme covert* any right of dower or other interest in real estate, which the said *feme covert* may be entitled to at the date of such deed." Act of Dec. 20, 1814; re-enacted in 1819, and in substance in 1849, ch. 99, § 7, Code of Virginia, 514. And similar statutory provisions

covenants for title, depends, in this country, to a great extent, upon the statutory provisions adopted in the different States, for making the real estate of a decedent liable for the payment of his debts. As respects this liability, there is now no difference, either in England or here, between the covenants for title and any other specialty contracts; and although the examination of this subject strictly forms no part of the province of this work, yet a general reference to its doctrines may at least put the student upon the track of more satisfactory information.

In order to fasten a liability on an heir there were two requisites necessary at common law. First that he be expressly named;¹ so that in an action against him as heir, it was necessary that it should be averred that he was named in and bound by the obligation, and this, as we have seen, was the rule as to the ancient warranty.² In the second place it was necessary that the heir should have assets by descent sufficient to meet the demand, and he was bound by the warranties, covenants, or other specialties of his ancestor only to the extent of these assets.³ A specialty

exist in the States of Illinois, Indiana, Michigan and Wisconsin. In Delaware, the Statute of Conveyances, (Revised Laws of 1829,) declares that "such deed shall not bind her to any warranty except a special warranty, against herself and her heirs, and all persons claiming by or under her." It may be proper that such covenants should enure by way of estoppel, and it is possible the Delaware Statute may have meant no more; but by thus placing a restriction upon the covenants of a *feme covert*, the inference would seem to arise that the covenants were deemed of some validity, which seems to be denied in most of the States.

¹ Co. Litt. 209 a., *Lloyd v. Thursby*, 9 Mod. 163.

² Br. Abt. Garranties, pl. 89; *supra*, p. 178.

³ *Buckley v. Nightingale*, 1 Strange, 665, 2 Blacks. Com. 243. Thus it was obviously held in 3 B. Monroe, 385, that heirs of their mother's estate could not be made to pay, out of it, damages caused by a breach of their father's covenants for title. See Platt on Covenants, 450.

creditor acquired, however, additional means of recompense by the death of his debtor ; for although by the old rule of the common law, during his lifetime no recourse whatever could be had to his lands, by means of execution, and the statute of Westminster the Second¹ gave but a right to have one-half of them extended or delivered under a writ of *elegit*, yet after the death of the debtor, an action lies against the heir upon the specialty debts, by means of which all the assets by descent were liable to be taken in execution.²

The result was that the bond creditor had, after his debtor's death, a greater security than the judgment creditor, for the latter, by reason of his judgment, charged the heir only as tenant of the land. No personal action would lie against the heir on such judgment, and the only remedy of the creditor was by *scire facias*, to have execution of the lands, which, as has been seen, under the statute of Westminster he could have but to a limited extent,³ as the death of the ancestor did not alter the nature of the execution any more than it did the nature of the debt,⁴ while on the bond debts, the creditor could, at his election, by a special judgment, have execution upon all the lands in the possession of the heir.

A *warrantia chartæ* or a voucher, being essentially real actions, could of course be brought only against the heir, but upon covenants, as upon other specialties, the creditor might sue either heir or executor at his option, or bring separate actions against them at

¹ 13 Edward I. c. 18.

² Sir William Harbert's case, 3 Rep. 12 a ; *Davis v. Pepys*, Plowd. 441.

³ Harbert's case, 3 Rep. 12 a ; *Bowyer v. Rivitt*, W. Jones, 87.

⁴ *Stileman v. Ashdown*, 2 Atkins, 608.

the same time,¹ so that an heir could not plead in an action brought against him, that there was an executor who had assets.²

Nor was there, at common law, any distinction between bond debts and covenants, either as to the liability of the heir to be sued upon them, or the right of the covenantee to come in upon the assets as a specialty creditor;³ nor, consequently, between covenants for title and other specialties,⁴ nor was it material whether the covenant was broken before or after the covenantor's death, provided the amount of the damages was liquidated.⁵

But although the heir was thus bound by his ancestor's bonds and covenants when named in them, and to the extent of the assets, yet if, before suit brought, he had alienated the lands which he inherited, the creditor was without remedy.⁶

The statute of Fraudulent Devises⁷ no doubt intended to remedy this mischief not only with respect

¹ Br. Abt. Assets per descent, pl. 33, Com. Dig. Pleader, 2, E. 8; Benloe, 97, n. 142.

² Galtor v. Hancock, 2 Atk. 426; Davis v. Pepys, Plowd. 441; Quarles v. Capel, 2 Dyer, 204, b; Davis v. Churchman, 2 Lev. 189; Benloe, 97 n. 142.

³ Plumer v. Marchant, 3 Burr. 138; Godolp. Orp. Leg. Part II. ch. 28. Wentw. Ex. 146; Dyke v. Sweeting, Willes, 585; Benson v. Benson, 1 P. Wms. 130; Musson v. May, 3 Ves. & Beames, 197; Jenkins v. Bryant, 6 Simons, 603; Watson v. Parker, 6 Beavan, 283; Frazer v. Tunis, 1 Binney, 254.

⁴ Cruise, Deed. Ch. 20, § 66. In the case of the Earl of Bath v. The Earl of Bradford, 2 Ves. Sr. 587, one who had received a covenant for quiet enjoyment, and whose damages were liquidated by a recovery against the executor, was held by Lord Hardwicke to be a specialty creditor. In Giles v. Roe, 2 Dickens, 570, the same was applied to a covenant for seizin, and in Parker v. Harvey, 2 Eq. Ca. Ab. 460, to a covenant against incumbrances.

⁵ Cox v. King, 9 Beavan, 533; Morse v. Tucker, 5 Hare, 79; Davis v. Smith, 5 Geor. 285; Stultzfooz Appeal, 3 Penns. 265.

⁶ Plunket v. Penson, 2 Atkins, 204; Davys v. Pepys, Plowd. 439.

⁷ 3 and 4 Will. and Mary, c. 14.

to the ancestor's specialty *debts*, but perhaps also as to his *covenants*, as the fifth section of that statute, after reciting that many heirs at law, to avoid the payment of such just debts, as in regard to the lands descending to them they had become liable to pay, had aliened such lands before process was or could be issued against them, declared that the heir should be answerable for such debts in an action of debt to the value of the lands so aliened, unless they had been *bona fide* aliened before suit brought.¹

But however this section may have been intended to protect as well a covenantee as a specialty creditor, it may be doubted whether its provisions were deemed sufficiently explicit for that purpose. In the first place, the cases of *Wilson v. Knubley*,² and *Farley v. Briant*,³ though based upon another section of this Act to be presently referred to, held that the provisions of that section, which are, in this respect, very similar to that just cited, applied to debts and actions of debt, and could not receive so liberal a construction as to include covenants; in the second

¹ Before the passage of the statute of frauds, (29 Car. II. c. 3,) descended trust estates were not assets in the hands of the heir. But that statute provided that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, the trust should be taken to be assets by descent, and the heir liable, by reason of such assets, as fully and amply as he might have been if the estate in law had descended to him in possession, in like manner as the trust descended. Mr. Baron Platt, in his work on Covenants, p. 451, remarks, "A right of action against the heir, in respect of such assets by descent, cannot, it is apprehended, be defeated by his alienation of the estates prior to the commencement of, or pending legal proceedings: the charge once attaching will, it is supposed, continue in operation against him and his personal representatives, for the benefit of the covenantee or his representatives, until compensation be made for any breach of the covenant committed during the lifetime, or even after the decease of the ancestor."

² 7 East. 127.

³ 3 Adolph. & Ell. 839.

place, it was not uncommon to find in English conveyancing a bond to secure the performance of covenants, on which, as is seen in many of the cases, actions of debt will lie,¹ which practice has been introduced, it is generally supposed, in order to bring the case within the letter of the statute; and thirdly, in a recent Act,² which was intended to amend and supply the defects in the statute of William & Mary, after the words "liable to pay the debts" is inserted, "or perform the covenants," and the word "covenants" is introduced after "debt or debts" whenever it occurs.³

The peculiar difference which appears to exist between the English and American law as to the liability of an heir on his ancestor's covenants for title is, that, as in England, the covenant is no lien upon his real estate during his life, so it does not become

¹ It may be supposed that there are also reasons which, in this country, seem to point out the propriety of taking a bond for the performance of covenants; on the ground that although a covenant itself, if unbroken at the death of the covenantor, would not be a lien upon his real estate, that a bond for the performance of such a covenant might be a lien. Such an opinion, however, seems not tenable. In *Godolphin's Orphan's Legacy*, Part II. ch. 28, it is said: "But executors, (under pretence or color of recognizances for the peace or good behavior, or the like, or under pretence of statutes for performing covenants touching the enjoying of lands not forfeited, nor any sums of money possibly ever thereupon becoming payable), are not to withhold payment of debts by specialty, and thereby defraud the creditors; so that if the statute or recognizance be only for performance of covenants, and no covenant be broken, an obligation for the payment of present money shall be discharged before it." But the passage merely refers to the duty of the executor as to not withholding payment on such pretences.

² 1 Will. IV. c. 47.

³ These statutes will be found in *Ram on Assets*, 213, and are also referred to in the late edition of *Saunders's Reports*, in the notes to *Jefferson v. Morton* and others, 2 Saund. 7, where the subject of the heir's liability, and what constitutes assets in his hands, is very satisfactorily examined.

one after his death, until action brought; and in case no action is brought, or if before such action the heir *bona fide* alien the land, the purchaser will take it clear of liability, whether the covenant be broken before or after the covenantor's death. If the alienation be a fraudulent one, though the purchaser's title will still be secured to him, yet the heir will be liable out of his own estate to the value of the lands thus aliened; and if the lands have not been aliened at all, but still remain in the heir's possession, he will be liable to the extent of their value, both by common law and by statute, and the covenantee may sue the heir or the executor at his election.

In the United States, it may be said that, as a general rule, lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract. In the two latter cases the existence of the debts creates no lien during the debtor's life, but by his death their quality is changed—they become a lien upon his real estate, which descends to the heir or passes to the devisee, subject to the payment of the debts of the ancestor according to the laws of the State in which they are situated, “and the heir or the devisee have no right but that of possession until the creditors shall be satisfied,”¹ and the right of the latter can in most of the States be enforced against the lands in the hands of a *bona fide* purchaser,² within certain statutory limitations as to time.

But although this may be the general principle, yet

¹ *Watkins v. Holman*, 16 Peters, 63; 4 Kent's Com. 424; 2 Hilliard's Abt. 539.

² *Gore v. Brazier*, 3 Mass. 523; *Graff v. Smith*, 1 Dall. 481; *Richard v. Williams*, 7 Wheat. 59; *Griswold v. Bigelow*, 6 Connect. 268.

in its application it is modified by the various local laws of the States. By the common law, as we have seen, a covenantee might sue either the executor or the heir, at his election, but this has been altered by statute in many States, where it is held that the liability of an heir on the covenants of his ancestor is a contingent one, depending upon the inability of the covenantee to procure satisfaction out of the personal estate.¹

It is not, however, my purpose to enter into this interesting subject, of the liability of real estate for the debts of a decedent. It is one almost exclusively local in its application, and it may be sufficient to have briefly referred to the common law, and pointed out the sources whence fuller information may be derived with respect to its alteration.²

¹ Webber v. Webber, 6 Greenl. 136; Hutchinson v. Stiles, 3 New Hamp. 399; Boyd v. Armstrong, 1 Yerger, 40; and in Boyd v. Berrell, 12 Mass. 399, where the heir was sued on the ancestor's covenant for title, the plaintiff was nonsuited on the ground that application had not been first made to the personal estate through the administrator. The remark of Gibson, Ch. J., in Fritz, Executor of Christman v. Evans, Administrator of Fritz, 13 Serg. & Rawle, 14, that "in Pennsylvania, lands being in all cases assets for the payment of debts, only the executor can be sued," would seem to apply to all other States where lands are thus made assets in the hands of the executor, and in them the immediate liability of the heir by an action of covenant against himself would seem to be taken away. As to his *ultimate* liability, the statutory provisions are, in different parts of the country, widely different. In many States, the land can be summarily taken in execution in the hands of the heir or devisee, upon a judgment thus obtained against the personal representative. This was formerly the law in Pennsylvania, but has since been altered in that State, and a *scire facias quare executio non* is now directed to the heirs and devisees, with notice to the terre tenants, who, notwithstanding the judgment against the personal representative, will, in some cases, be let in to contest the claim on its original grounds. Murphy's Appeal, 8 Watts & Sergeant, 165; Atherton v. Atherton, 3 Barr, 113.

² It may, however, be observed, that in tracing the course of legislation in the different States, they will be found greatly in advance of English

3. Of the devisee. Much of what has been said as to the liability of the heir will equally apply to

legislation on this subject. The old feudal doctrines, which, to prevent the alienation of real estate, cumbered it with fines and restraints, gave place, when a new state of society demanded that the right of alienation should be unfettered, to an immunity of real estate, which protected the purchaser at the expense of the creditor, and the legislative provisions which, until very recently, existed, were inadequate to regulate the equal interest of both, and it was not until the year 1833, that by the statute 3 and 4 William IV. c. 104, freehold estates were made assets for the payment of simple contract debts; and all will remember the anxious and untiring efforts of Sir Samuel Romilly to bring about such provisions sixteen years before that time, and the clamor which was raised in opposition to it, to the effect that "the heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors." This was said by so good a lawyer as Sir William Grant. See the interesting remarks of Sir S. Romilly in his autobiography, 2 vol. p. 389, and see *Lives of the Chancellors*, vol. 7, p. 266.

On the other hand, from the earliest settlement of some of the American colonies, the doctrine of the liability of a decedent's lands to the payment of his debts, whether due by matter of record, specialty, or simple contract, has been said to have grown up with the laws. In many of them the death of the debtor changed his debts into liens, and a purchaser or a devisee stood in those States, as in Pennsylvania, in no better position than the vendor or the testator. *Morris's lessee v. Smith*, 1 Yeates, 244. In a few only of the colonies is this believed to have been otherwise. It has been assumed by authority entitled to respect, that real estate is, in general, and has been, from the early settlement of the colonies, liable for the debts of the ancestor in the hands of his devisees, his heirs, and *bona fide* purchasers from them; 4 Kent. Com. 420; 2 Hilliard's Abr. 559; *Watkins v. Holman*, 14 Peters, 63; but in fact the statute 5 Geo. II. c. 7, expressly declared that lands, &c., in all the American colonies, should be assets for the payment of debts. In Pennsylvania, there were many statutes to this effect prior to the year 1705. Some reference to them may be found in the note to 1 Smith's Laws, 9, and the Appendix to Peter Miller's edition of Acts of Assembly, published in 1762, and the dissenting opinion of Mr. Justice Kennedy in *Bellas v. M'Carthy*, 10 Watts, 31.

In North Carolina, a statute, passed in 1715, declared that creditors of any person deceased should make their claim within seven years after the death of such debtor, otherwise such creditor should be forever barred; and the opinion had been more than once expressed in interpreting this statute, that its words, being without any saving or exception whatever in favor of any incapacity, were so express as even to exclude claims on which the cause of action did not arise until after that time had expired. *McClellan v. Hill*, Conference Rep. 479; *Jones v. Brodie*, 3 Murphy, 294; *Raynor v.*

that of the devisee. At common law he was not bound by the covenants of his testator, nor could

Watford, 2 Dev. 339. But in *Godley v. Taylor*, 3 Dev. 178, the question presented was, whether a covenantee, evicted after the expiration of seven years from the death of the covenantor, was deprived of his claim against his estate, and it was held that he was not; that the legislature could not have meant to exclude a claim that might arise *in futuro*, and which could not be enforced until it did arise or accrue.

In connection with this subject the case of *Booth v. Starr*, 5 Day, 275, may be here mentioned. The estate of one who, some years before his death, had conveyed land with covenant of warranty, was represented to be insolvent by his administrators, and commissioners were appointed by the court to receive the claims of creditors, which were to be presented within six months. The estate turned out to be solvent, and the commissioners reported a balance in the hands of the administrators after payment of all presented debts and claims, which was paid to the guardian of the intestate's heir. Two years after this, the covenantee was evicted, and sued the administrators, who pleaded the above facts in bar, to which the plaintiff demurred. It was held by the Court, that the limitation for exhibition of claims of creditors was conclusive as to the extent and amount of the administrator's liability, and this, whether the estate was solvent or not—that the administrators, having then lawfully divested themselves of every part of the estate, could not be made liable for future claims, and that it was immaterial whether the claim did or did not exist within the specified time. "My reasoning is," said Brainard, J., who delivered the opinion of the Court, "that as the claim was not exhibited until after the time limited, and as it was within no saving, therefore it is barred. . . . The claim, therefore, if it exists, must be against the heir, who must also be the proper person to contest it. . . . It does not appear, in this case, that the heir received any estate of inheritance from his ancestor, and, therefore, he cannot be liable, in regard to assets real, by descent. The daughter, in one sense, is heir to the covenant of warranty: a covenant real, on which as such, as she has received no estate of inheritance, she cannot be liable, for the heirs intended by the deed are heirs at common law, but under our statute of distribution, she has received the surplus estate of the covenantor. To this, in her hands, the equity of the claim seems to point. But to reach it may be difficult." The very able dissenting opinion of Mitchell, Ch. J., renders any other comments on this decision unnecessary. One holding an unbroken covenant of warranty could not, it was said, be designated in the statute as a creditor neglecting to present his claim, and the Court could not have allowed it if he had presented it. The statute of Connecticut, he showed, created a joint fund of the real and personal estates, and made both assets in the hands of the administrators—they also required a refunding bond to be given to him by the heirs, for the purpose of a security for all claims

the lands be followed in his hands.¹ In this respect he enjoyed an even greater immunity than the heir, for the latter, when named in his ancestor's covenants, was liable to the amount of the assets which had descended to him, but a devisee took the land cleared of all liability. It will be remembered that an heir cannot strictly be said to take also as devisee, as the familiar rule applies that one taking the same estate in quantity and quality under his ancestor's will which he would do as his heir by operation of law,

against such estates to the amount of all the assets, real and personal. "This bond can never be forfeited if the administrator is not to be accountable for debts afterwards arising. . . . In the meantime, the bond of the administrator to the court of probate has been fulfilled by a distribution of the estate, and the acceptance of this bond for the heir; and as no other bond or security for such creditors is required from the heirs, the property which the law intended to guard and preserve for the heir's benefit, may be squandered with impunity, and without any remedy." Subsequently, however, a petition in Chancery was filed in the same case, (5 Day, 411), on the hearing of which, the Court held, that although the claim against the administrator might be barred, yet the petitioner's right was not extinguished, and the assets were held liable in equity in the hands of his heir or guardian.

In the subsequent case of *Griswold v. Bigelow*, 6 Conn. 259, a covenantee who was evicted thirty-four years after the estate of his covenantor was distributed, after the usual proceedings and limitation of time for the exhibition of claims, raised an administration *de bonis non*, exhibited the claim to the court of probate, which was allowed, and the personal assets being exhausted, an order was granted for the sale of the real estate, which was accordingly sold in the hands of a *bona fide* purchaser, and these proceedings were confirmed by the Supreme Court of that State, in an able opinion by Hosmer, Ch. J., and there seems to have been no question made of the jurisdiction of the court of probate in the appointment of the administrator, and no appeal having been taken by the devisees and other parties in interest from the decree of that court, as respected the allowance of the claim, and the order of sale, it was held that that decree could not be inquired into collaterally, and the only question then was, whether the lien on the land of the decedent still continued; the court had no doubt that it did, and that the distribution or alienation of the estate could not affect it in any way. From a defect in the administrator's deed, however, his vendee was held not entitled to recover in ejectment.

¹ *Plunkett v. Penson*, 2 Atk. 204; *Plasket v. Beeby*, 4 East, 491.

shall be adjudged to take by descent and not by purchase, and the lands would be liable if not aliened.

To prevent the injustice of a devise depriving a specialty creditor of a means of satisfaction, the second section of the statute of fraudulent devises,¹ after reciting that many persons after having bound themselves and their heirs, had died seized of lands, and to the defrauding their creditors had devised the same, so that the creditors had lost their debts, declared that all wills, &c., should be taken as against such creditors, and their executors, &c., to be void and of no effect, and the third section gave the creditors a right of action upon their specialties against the heir and devisee jointly, and the devisees were made liable in the same manner as heirs, notwithstanding alienation by them.

But in *Wilson v. Knubley*,² although it was said by Lord Ellenborough that the grievance recited in the preamble of the Act would have led one to suppose that the legislature meant to give a larger remedy than the action of *debt*, yet the Court felt themselves bound by the letter of the Act, which spoke only of debts and actions of debt; and in an action brought against the devisee of one who had given covenants for title and died without heirs, judgment was given for the defendant, though it was agreed that the case came within the mischief intended to be remedied by the statute.

The point that there being no heir, the case did not come within the letter of the Act, which gave a remedy against the heir and devisee jointly, though mentioned in the argument, did not form a basis of

¹ 3 and 4 Will. and Mary, c. 14.

² 7 East, 134.

the decision, but in *Hunting v. Sheldrake*,¹ it was expressly held that a specialty creditor could not maintain an action against the devisee alone, there being no heir. So it was further held, in the construction of this Act, that it applied only where a debt, in the ordinary sense of the word, existed between the parties in the lifetime of the debtor, and therefore that an action of debt did not lie against a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated, so that in form they might be sued for in an action of debt.² The statute of fraudulent devises has, however, been amended in these deficiencies by the Act of 11 Geo. IV. c. 47, soon after supplied by that of 1 Will. IV. c. 47, which expressly includes covenants as well as debts, and also gives an action against the devisee alone where there is no heir.³

In the recent case of *Morse v. Tucker*,⁴ the question presented was of general application. It was whether damages for a breach of the covenant for quiet enjoyment occurring after a testator's death, constituted a debt within the meaning of a clause in his will, charging all his unsettled real estate with the payment of his debts. In an action brought against his devisees, the cases of *Wilson v. Knubley*, and *Farley v. Briant*,⁵ were relied on by the latter, but Vice

¹ 9 Mees. & Welsby, 256.

² *Farley v. Briant*, 3 Ad. & Ell. 839.

³ A convenient reference to these statutes may be had in the notes to *Jefferson v. Morton*, 2 Saunders, 8 a.

⁴ 5 Hare, 79.

⁵ As also the case of *Jenkins v. Briant*, 6 Simons, 603, where the testator granted an annuity, and bound himself by covenant to pay it. It fell into arrear after his death, and the Vice Chancellor held that the devisees were

Chancellor Wigram declared that he would be inclined, in the absence of authority, strongly to lean against that construction of the will which would exclude the claim in question. He did not agree in the observation made at the bar, that claims such as these, were, in a moral point of view, distinguishable from debts due at the death of the testator. If a person sells an estate for its full value, and, in consideration of that value being paid to him by the purchaser, by covenant guarantees the title, he could not agree that such vendor was justified in enriching his personal estate at the expense of the purchaser, and afterwards disposing of his property by will so as to make his guarantee valueless, though the title to the property should turn out good for nothing. He thought, moreover, that the case was ruled by the authority of the *Earl of Bath v. the Earl of Bradford*,¹ and also by that of *Lomas v. Wright*,² where Vice Chancellor Leach had held, that persons entitled to damages for a breach of the covenant for quiet enjoyment were entitled to come in as creditors upon the proceeds of property sold, under direction in a will, for the payment of debts; and a decree was therefore entered for the plaintiff.

4. Of the executor or administrator. The liability of an executor differs from that of the heir in that while the latter is not bound by his ancestor's cove-

liable to pay it, on the ground that the sums to be recovered were fixed and certain, which, it was said, distinguished the case from *Wilson v. Knubley*, and *Farley v. Briant*. It was, therefore, urged in *Morse v. Tucker*, that when the amount was not thus fixed, being unliquidated damages, it could not be said to be a debt.

¹ 2 Ves. Sr. 587, *Supra*, p. 440, note.

² 2 Mylne & Keen, 775.

nants, unless named in them, a contrary rule prevails as to the former.¹ Nor can a distinction prevail between the liability of an executor upon covenants broken after the testator's death, and those broken before that event.²

¹ "And therefore if a man bind himself by obligation or covenant to pay money or to do any such like thing and do not bind his executors or administrators by name, in this case the executor or administrator may be sued and may be charged as far forth as if they were named." Touch. 482; Brooke's Abt. Covenant pl. 12, Wentworth's Executor, c. 11, pp. 239, 243, &c. Nor is this liability of the executor confined, as the above quotation might seem to imply, to mere obligations to pay money, but it extends to any "obligation, contract, debt, covenant or other duty," (*Wheatley v. Lane*, 1 Saunders, 216, note; Com. Dig. Covenant, C. 1; *Plumer v. Marchant*, 3 Burr. 1380,) except such as are of a particular personal character. Instances of these may be found in 2 Williams on Executors, 1469, &c. It is sufficient to say that covenants for title are not included in these exceptions.

² In *Perrot v. Austin*, Cro. Eliz. 232, it is said to have been resolved that if one covenant that his executors shall pay ten pounds, no action will lie against them, for it was no debt of the testator, and therefore could not survive. But Lord Mansfield said, in *Plumer v. Marchant*, that this was an extraordinary case; and the contrary has been recently held, in *Randall v. Rigby*, 4 Meeson & Welsby, 130; and *Ex parte Tindall*, 8 Bing. 402. So with respect to the covenants for title; in *Wells v. Fyde*, 10 East, 316, one who had received a covenant for quiet enjoyment was evicted after the death of the covenantor, and no question seems to have been made of the liability of his executor, although the covenant had not been broken in the lifetime of the testator. The cases of *Swan v. Stranshan*, Dyer, 257 a, *Proctor v. Johnson*, 2 Brownlow, 214, *Adams v. Gibney*, 6 Bing. 656, and *Andrew v. Pierce*, 1 New Rep. 158, which might be thought authorities against this position, will, on examination, be found to have been decided upon another ground; *Supra*, p. 364. In the very recent case of *Williams v. Burrell*, 1 Common Bench Rep. 401, which was well and elaborately argued, an action of covenant was brought against executors, for a breach, after the testator's death, of a warranty entered into by him, and no question was made, on the argument, of the liability of the executor depending upon the breach happening before or after the testator's death; and from a remark made by Maule, J., in the course of the argument, the point seems not to have been overlooked, as he said: "Here the heir being named and the executors not, it may be contended that the latter were intended to be excluded." The case, however, was argued and decided upon other grounds, and Tindal, Ch. J., said, "Upon principle and authority we think this an express covenant for quiet enjoyment, and conse-

5. Of the assignee. The liability of an assignee upon covenants for title entered into by his assignor, is one which can never arise where the deed which contains the covenants conveys an estate in fee simple, as in such case the land passes at once, and entirely, from the possession of the vendor, who has, therefore, no estate to transfer to a subsequent purchaser. But the question of an assignee's liability may arise where the conveyance is of a leasehold estate, and the covenants are then held binding upon the assignee of the reversion.¹

Having thus considered the *liabilities*, we next approach the subject of the *rights* arising under the covenants for title.

1. Of the covenantee. As the covenants for seizin, for right to convey, and against incumbrances, are in

quently that the defendants are liable thereon as executors of the covenantor." See this case, *supra*, p. 364, note. So in this country, in *Hovey v. Newton*, 11 Pick. 421, it was held that damages for a breach of the covenant for quiet enjoyment, which had accrued both before and after the covenantor's death, could be recovered in one and the same action against his administrator, Putnam, J., saying: "The whole damage sustained by the plaintiffs from the breach of the covenant of the intestate becomes a debt against his estate, for which the defendant is answerable." And it is well settled that, in the absence of local statutes to the contrary, a covenant for quiet enjoyment, for further assurance, or of warranty, is in no respect different as to the liability which it imposes from any other specialty debt; as for instance, a covenant to pay a certain sum of money, which though the time of payment might be subsequent to the death of the covenantor, yet would create a valid claim against his executor.

¹ See *Thursby v. Plant*, 1 Saunders, 237, and notes. In a recent case in New York (*Buck v. Bininger*, 3 Barb. S. C. R. 403,) it was obviously held that the purchaser of a remainder, expectant upon the determination of a lease for life, in which was a covenant for quiet enjoyment, could do nothing to interfere with the enjoyment of the life estate by the tenant, and the case seems to have been put on the ground of preventing circuity of action; but the more natural reason would seem to be that the purchaser simply took the estate subject to the tenancy.

this country, as a general rule, held to be broken as soon as they are made,¹ it follows that immediately upon the execution of the deed which purports to convey the estate, a right of action upon these covenants enures to the party who has received them, upon which his damages will be real or nominal, according to the injury which the defective title has visited upon him.²

It would also seem to follow, that after the lapse of twenty years from the execution of the deed, the common law presumption that these covenants had been satisfied or released would arise,³ even if they should not come within the letter of any local statutory enactment.⁴ With respect, however, to the covenants for quiet enjoyment, for further assurance, and of warranty, a statute of limitation, expressed as such statutes usually are, would not begin to run until there had been an actual breach, and of course the presumption would not arise until twenty years from that period.⁵

It has been settled from an early day that covenants for title (and the same rule applies equally to all covenants), are to be construed as joint or several according to the interest taken by the parties with whom they are made, or in whom the right to take advantage of them has vested.⁶ Thus if the benefit

¹ See *supra*, p. 285, *et seq.*

² *Supra*, p. 79, *et seq.*

³ *Stewart v. West*, 2 Harris, 338-9; *Heath v. Whidden*, 24 Maine, 383.

⁴ *Clark v. Swift*, 3 Met. 390; Rev. Stat. of Massachusetts, c. 120, § 7; *Bird v. Smith*, 3 Engl. 368; *Webber v. Webber*, 6 Greenl. 138.

⁵ *Stewart v. West*, 2 Harris, 338; 9 Jarman's Conveyancing, 402.

⁶ In *Slingsby's case*, 5 Coke, 18, (which is generally cited as the leading case,) where one granted land to four, although he covenanted *with each and every of them* that he was seized in fee, it was held that all must join in an action on the covenant, because their interest was that of a joint-tenancy.

of a covenant has descended upon coparceners, all must join in suing upon it;¹ if it has vested in tenants in common, all may join in respect of their joint interest, or each may sue separately, at his election.²

2 and 3. Of the heir and devisee. It has been seen that the *liability* of an heir depended, among other things, upon his being named in the covenant.³ In the case of the ancient warranty, the same rule was applied as respects the *right* of the heir to sue. Unless named in the warranty, he could not take advantage of it.⁴ But with respect to covenants, this rule has been sought to be altered, and the conclusion seems to have been arrived at, that where, from the instrument, the intention appears that a covenant, in its nature capable of running with land, should continue in operation

So in *Eccleston v. Clipsam*, 1 Saunders, 153; *Anderson v. Martindale*, 1 East, 501, and *Lane v. Drinkwater*, 1 Crompt. Mees. and Rosc. 599; S. C. 5 Tyr. 40, and the reason is said to be that where the interest is joint, if several were to bring actions, the Court would be in doubt for which of them to give judgment. This rule applies, it will be seen, irrespective of the language in which the covenant itself is expressed. Mr. Preston, however, was of the opinion (*Preston's Touchstone*, 166,) that by express words clearly indicative of the intention, a covenant might be joint or several, notwithstanding the nature of the interest, and this seems supported by some dicta in two recent cases in the Exchequer, *Sorsbie v. Park*, 12 Mees. & Welsb. 146; *Keightley v. Watson*, 3 Exch. 716; and to the same effect is *Catlin v. Barnard*, 1 Aik. 9, but the point has been expressly ruled the other way in many cases; *Foley v. Addenbroke*, 4 Queen's Bench, 197; *Hopkinson v. Lee*, 6 id. 964; *Cathrail v. Brown*, 3 Leigh, 98; *Ludlow v. McCrea*, 1 Wend. 228. See an article on this subject in 14 Eng. Law Mag. (New Ser.) 79.

¹ *Tapscott v. Williams*, 10 Ohio, 443; *Slingsby's case*, *passim*. It will be remembered that the favor extended by the common law to joint tenancy, has little existence in this country, and the right of survivorship has been abolished in most, if not all our States.

² *Eccleston v. Clipsam*, 1 Saund. 154; See Platt on Covenants, 130; Walford on Parties to Actions, 428, 9 B. Mon. 58.

³ *Supra*, p. 438.

⁴ Co. Litt. 384 b, *supra*, p. 178.

longer than for the life of the covenantee, advantage may be taken of it by the heir, although not named in terms;¹ and it has been further suggested that such covenants might, in general, be construed to run with an estate of inheritance to the heir, unless an evident intention be manifested to confine them to the covenantee.²

The right, however, of an heir to take advantage of the covenants for title which his ancestors have received, depends, throughout the greater part of this country, upon the nature of those covenants; as it has been seen in a former chapter, that the covenants for seizin, for right to convey, and against incumbrances are held to be broken as soon as made,³ and thereby turned into choses in action, incapable of transmission or assignment. A suit upon these covenants can therefore only be maintained by the personal representative of the covenantee. Hence it has been somewhat generally said that these covenants do not run with the land; but as thus stated the proposition is scarcely accurate. All the covenants for title run with the land until breach, and the difference between the American and the English authorities is, that according to the former, the covenants for seizin, for right to convey, and against incumbrances, are held to be broken as soon as made; while according to the latter, no distinction is taken between these covenants and those for quiet enjoyment and of warranty, which on both sides of the Atlantic are held to be prospec-

¹ *Lougher v. Williams*, 2 Lev. 92; *Sacheverell v. Froggatt*, 2 Saund. 367 a; *Platt on Covenants*, 517. See the able argument of Mr. Gifford, in *Kingdon v. Nottle*, 1 Maule & Selw. 357; 4 id. 53.

² *Roe v. Hayley*, 12 East, 454.

³ *Supra*, p. 289, *et seq.*

tive in their operation, and not to be broken until an eviction, actual or constructive.

But the right of the heir or devisee to take advantage of these last named covenants depends entirely upon whether their breach did or did not occur in the lifetime of the ancestor or testator. Although in the cases of *Kingdon v. Nottle*,¹ and *King v. Jones*,² it seems to have been thought by the Court that the modern covenants for title, like the ancient warranty, descended, as to their benefit, upon the heir, irrespective of the time at which the breach took place, yet such a doctrine has been since corrected,³ and it is now well settled that where the breach occurs in the lifetime of the ancestor or testator, the right to recover the consequent damages vests in his personal representative; where the breach occurs after his death, the right of action must be exercised by the heir or devisee, on whom the damage has fallen.⁴ If, however, the heir or devisee be at that time dead, the right of action vests in their personal representatives, the damages being of course personal estate.⁵

4. The foregoing remarks, and those that have been made in a former chapter, may be also referred

¹ 1 Maule & Sel. 355; see *supra*, p. 286. ² 5 Taunt. 418; *supra*, p. 287.

³ See *Raymond v. Fitch*, 2 Crompt. Mees. & Rosc. 588; *Ricketts v. Weaver*, 12 Mees. & Welsb. 718; *Walford on Parties to Actions*, 1368. In the recent case of *Young v. Raincock*, 7 C. B. 310, which was elaborately argued, the eviction having taken place during the lifetime of the purchaser, no objection was taken to the action having been brought by his executor. If the point had been considered as at all an open one, it is probable that the objection would have been made. See this case, *supra*, p. 390.

⁴ *Tapscott v. Williams*, 10 Ohio, 442; *Grist v. Hodges*, 3 Dev. 200; *South v. Hoy*, 3 Mon. 95; *Williams v. Hogan*, Meigs, 187.

⁵ *Beddoe's Executors v. Wadsworth*, 21 Wend.

to in considering the rights of the executor or administrator. They are entitled to the benefit of the covenants for title which could have been taken advantage of by the testator or intestate during his lifetime, and which were broken before his death.

5. As respects the rights of the assignee, a distinction always existed between the ancient warranty and covenants. Thus, the warranty implied by the word *dedi* could not be taken advantage of by the assignee of him who had received it;¹ but "if a man make a lease for years by the word *concessi* or *demisi*, (which implies a covenant,) if the assignee of the lessee be evicted, he shall have a writ of covenant."²

So with respect to the warranty and the covenant when expressed in words: "Regularly," says Coke,³ "if a man warrant land to another, and his heirs, without naming assigns, his assignee shall not vouch;" but with respect to a covenant the rule was different, and the assignee could take advantage of it though not named.⁴ The right, however, of an assignee to take advantage of covenants entered into with one prior to himself in the chain of title, depends upon many circumstances, which have been attempted to be explained in a former chapter.⁵

¹ "If a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch." *Spencer's case*, 5 Coke, 16.

² *Spencer's case*, 4th resolution; "For the lessee and his assignee hath the yearly profits of the land, which shall grow by his labor and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labor, and employed his cost upon the land, and be evicted (whereby he loses all,) that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to."

³ Co. Litt. 384 b.

⁴ *Spencer's case*.

⁵ See *supra*, Ch. VIII. page 301, *et seq.*

CHAPTER XIII.

THE PURCHASER'S RIGHT TO RECOVER BACK OR DETAIN THE
PURCHASE MONEY AFTER THE EXECUTION OF THE DEED.

THE distinction between the rules which govern the relation of vendor and purchaser, before and after the execution of the deed—while the contract is still executory and after it is executed—is a broad and familiar one. Although the general principles of the contract of sale of real estate, both in this country and in England, exact less from the vendor than the rules of the civil law demand,¹ yet, while the contract is still executory, they recognize and

¹ Much objection is made by the admirers of the civil law to the doctrine of *caveat emptor*, as applied to real estate. Cooper's Justinian, 610, 620, &c., but, as was well remarked by Lord Eldon in *Hiern v. Mill*, 13 Ves. 114, "no one in his senses would take an offer of a purchase from a man merely because he stood upon the ground." "In contracts of purchase," as has been well expressed, "the vendor and vendee, in the absence of special circumstances, are to be considered as acting at arm's length; and hence, although the vendor will not be allowed to practice any artifice for the purpose of concealing defects, or to make such representations as may have the effect of throwing the purchaser off his guard, yet, on the other hand, where the means of information as to the facts and circumstances affecting the value of the subject of sale, are equally accessible to both parties, and neither of them does or says any thing to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, is not requisite to the validity of the contract; there being no breach of any implied confidence that either party will not avail himself of his superior knowledge, because neither party reposes such confidence, unless specially tendered or required." Atkinson on Marketable Titles, 134.

enforce the right of the purchaser to a title clear of defects and incumbrances, and this right, it has been often said, is one not depending for its origin upon the terms of the contract, but is given by the law;¹ nor, except in particular cases, is this right affected by the nature and extent of the covenants for title which the purchaser is to receive.²

But when the deed of conveyance has been delivered, a different rule applies.³ The contract is then executed, and any inconsistencies between its original terms and those of the deed, are, in general, to be explained and governed solely by the latter, into which the former is merged, and by which the parties are thereafter to be bound, and the purchaser's only right for relief, either at law or in equity, from defects or incumbrances, depends, in the absence

¹ *Throughton v. Throughton*, 1 Ves. Sr. 86; *Newman v. Rogers*, 4 Bro. C. 394; 2 Sugd. Vend. 419; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Crippes v. Reed*, 6 Term R. 162; *Roffey v. Shallcross*, 4 Madd. 122; *Judson v. Wass*, 11 Johns. 525; *Dalby v. Pullen*, 3 Simons, 29; *Ward v. Trathen*, 14 Sim. 82.

² The exceptions to this proposition are, perhaps, peculiar ones; as, where a purchaser makes a chancing bargain and relies on the covenants he is to receive for his protection, Sir E. Sugden says, "If a purchaser, before executing the articles, has notice of an incumbrance, *which is contingent*, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him; and he cannot, therefore, detain any part of the purchase money." 2 Sug. 420; *Vane v. Lord Barnard*, Gilbert's Eq. R. 5, which is the authority cited, was not strictly a case of vendor and purchaser; it arose under a marriage settlement. See *Clark v. Faux*, 3 Russel, 320.

³ The distinction is a familiar one, that there are many cases in which equity would have refused to decree a specific performance of the contract, yet which, being executed, it will refuse to disturb. *Twining v. Morrice*, 2 Br. Ch. 326; *Mortlock v. Buller*, 10 Ves. 308; *Cadman v. Horner*, 18 Ves. 10; *Brocksop v. Lucas*, id. 335; *Clermont v. Tasling*, 1 Jac. & Walk. 120; *Vigers v. Pike*, 2 Drury & Walsh, 1, on appeal, 8 Cl. & Fin. 562; *Seymour v. Delancey*, 6 Johns. Ch. 230; *Gans v. Renshaw*, 2 Barr, 37. Sto. Eq. § 206.

of fraud, solely upon the covenants for title which he has received.

The connection, therefore, between covenants for title and a purchaser's right to relief, whether administered by a court of law or equity, is, on both sides of the Atlantic, a necessary and intimate one.¹ This has been settled by a series of decisions from an early period. In the Lord Buckhurst's case,² it was held that if one seized in fee convey without warranty, "the title papers pass to the grantee, because he is to defend the land at his peril." The case, however, generally cited as the early leading authority on this point, is Sergeant Maynard's case,³ where Lord Nottingham is reported to have said, "He that purchases lands without any covenants or warranties against prior titles, if the lands be afterwards evicted by an *eigne* title, can never exhibit a bill in equity to have his purchase money again upon that account; possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid; for the chancery mends no man's bargain."

The doubt here expressed as to the right to *detain* the purchase money, has long since been removed; and it is one of the most settled principles of the law of vendor and purchaser, that a purchaser who has received no covenants which cover the defect or incumbrance, can neither detain the purchase money,

¹ Except in Pennsylvania, where, as will be hereafter shown, even after the execution of the deed, the contract is still executory as to such part of the purchase money as is unpaid, and the absence or presence of covenants which include the defect, is immaterial.

² 1 Rep. 1.

³ 2 Freeman, 1; S. C. Rep. temp. Finch, 288, and Appendix to 3 Swanton, 651.

nor recover it back, if already paid. Unless there has been fraud, he is absolutely without relief, as against his vendor, either at law or in equity.¹

¹ *Urmston v. Pate*, reported, 4 Cruise, 394, (4th ed.) and 2 Sugd. 425, cited by Lord Loughborough in *Wakeman v. Duchess of Rutland*, 3 Ves. Jr. 235; *Craig v. Hopkins*, 2 Coll. of Decis. 517; Butler's note to Co. Litt. 384 a; *Thomas v. Powell*, 2 Cox Ch. 394; *Bree v. Holbeck*, Dougl. 655. (This was a very strong case. An administrator, with the will annexed, found among the papers of his testator, a mortgage, and assigned it for full value, covenanting that neither the testator nor himself had done any act to incumber the mortgaged estate. The mortgage turned out to be forged; but as there was no evidence that the administrator knew of this, Lord Mansfield held that the purchaser could not recover back what he had paid. The administrator "did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." This case, though recognized as correct in this application, must be considered as confined to this application alone. See *Price v. Neale*, 3 Burr. 1355; *Cripps v. Read*, 6 Term R., 606; *Jones v. Ryde*, 5 Taunton, 488, S. C.; 1 Marsh. 163; *Smith v. Mercer*, 6 Taunt. 76; *Young v. Adams*, 6 Mass. 182; *U. S. Bank v. Bank of Georgia*, 10 Wheat. 333.) *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Frost v. Raymond*, 2 Caines, 192; *Abbot v. Allen*, 2 John. Ch. 519; *Gouveneur v. Elmendorf*, 5 id. 79; *Doyle v. Knapp*, 3 Scam. 334; *Beale v. Leively*, 8 Leigh, 658; *Commonwealth v. McClanachan*, 4 Randolph, 482; *Allen v. Hopson*, Freem. Ch. (Mis.) 276; *Threlkelds v. Campbell*, 3 Grattan, 198; *Emerson v. County of W.*, 9 Greenl. 88; *Nance v. Elliott*, 3 Iredell's Ch. 408; *Maney v. Porter*, 3 Humph. 347.

"Courts of Equity do not," said Mason, J., in the recent case of *Platt v. Gilchrist*, 8 N. Y. Legal Observer, 11, "make new contracts for parties, or relieve them from the effects of those which they have fairly and deliberately made. They will interfere in cases of fraud, of accident, or mistake; but then it is on the ground either that there was no valid contract, or that the contract actually made by reason of accident or mistake, is different from the real intentions of the parties. In the one case, they declare the contract absolutely void; in the other, they make it what the parties originally intended it to be, if it can possibly be carried into effect according to their intent. But they never introduce a new stipulation into the agreement, and especially one which the parties themselves might have introduced, had they thought proper. A striking illustration of this doctrine is to be found in the refusal to interfere in the case of an express covenant to pay rent, after the premises, in consideration of which the rent is agreed to be paid, have been destroyed by fire, it is well settled, that a tenant can have no relief in such a case—that a court of equity is bound to put the same construction on such a covenant, and to give it the same effect that a court of law should

To this rule there is a single exception, and that is where fraud, or what is equivalent to it, has been practised upon the purchaser. In such case the mere fact of the contract having been executed by the delivery of the deed, does not deprive him of his right to relief, nor is it material whether the covenants for title do or do not extend to the particular defect or incumbrance.

But while this as a general principle is well settled, considerable difficulty has been somewhat recently experienced in England as to what degree of concealment or misrepresentation on the part of the seller, will, in particular cases, amount to fraud within the

do. In the ordinary case of a sale of land, the possibility that the title may fail, is a consideration that enters into the views of both purchaser and seller. If the purchaser does not wish to assume the risk of the title, he protects himself by covenants. If he assumes the risk, he accepts the deed without covenants, and receives his equivalent in the diminution of the price. When the very thing occurs, the hazard of which he has taken on himself, and for which he has received an equivalent, it would be any thing but equitable to restrain the collection of the unpaid purchase money. It would be throwing upon the seller the very loss which he had declined to assume, and be making him, contrary to the intention of the parties, the guarantor of the title, at least to the extent of the sum due."

There is a single case said to have been also decided by Lord Nottingham, which has laid down a different principle. In an anonymous case, in 2 Cas. in Ch. 19, the Chancellor is said to have relieved from payment of the purchase money, when the purchaser was evicted by a title to which his covenants did not extend. But the case was not only not taken down by the reporter, but he questions its accuracy and soundness in three very pertinent notes :

"1. If declaration, at the time of the purchase treated on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

"2. The affirmative covenant is negative to what is not affirmed, and all one, as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

"3. Quere. If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion ?

Nota. In many cases it may be easily done," &c.

above rule, and in a series of important cases the subject has received elaborate examination.

The leading case there may be said to be *Edwards v. McLeay*,¹ where the principle just referred to was distinctly laid down. In that case, the purchaser discovered, after the receipt of his conveyance, that the ground of his stables, and also of a driving way leading up to the house, were part of a common, and filed a bill to rescind the contract, and recover back the purchase money, with interest, and all the sums spent in repairs. He proved that the defendants were aware of these facts at the time of making the contract, that they were not disclosed by the abstract, and that they represented themselves to be seized in fee of the whole estate. Sir William Grant, M. R., in delivering his opinion, said, "This is a bill of rather an unusual description. It is brought by the purchaser of an estate, who has had a conveyance made to him, for the purpose of setting aside the sale and getting back his purchase money on the ground of an alleged misrepresentation with regard to the title of a part of such estate. It cannot certainly be contended that, by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase money. By the civil law it was otherwise. By our law, a vendor is in general liable only to the extent of his covenants; but it has never

"These remarks," says Sir E. Sugden, "are unanswerable, and if the doctrine in this case were law, the consequences would be serious, for what vendor would permit part of the purchase money to remain on mortgage of the estate if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted?" 2 Vend. 427.

¹ Cooper, 308.

been laid down that on the subject of title, there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In the case of *Urmston v. Pate*,¹ there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In the case of *Bree v. Holbeck*,² it did not at all appear that the administrator knew that the mortgage which he assigned was a forgery. Lord Mansfield says, 'if he had discovered the forgery and had then got rid of the deed as a true security, the case would have been very different.' And the purchaser had leave to amend his replication if, upon inquiry, the case would support a charge of fraud. Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. . . . The only other objection which the defendants make to the relief sought by the bill is, that the purchaser is premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend that a Court of Equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him."

Upon appeal to this decision,³ Lord Eldon observed

¹ *Supra*, p. 461, note.

² Douglass, 654. See this case in note 1 to page 461, *supra*.

³ 2 Swanston, 308.

that the case resolved itself into the question whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? He was not apprised of any such decision,¹ but he agreed with the Master of the Rolls that if one party make a representation which he knew to be false, but the falsehood of which the other party had no means of knowing, a Court of Equity will rescind the contract; the decree was therefore affirmed.²

¹ The Earl of Devon said of this remark in the great case of *Small v. Attwood*, when in the House of Lords, (see *infra*, page 466,) "The expression of Lord Eldon, that he was not apprised of any such decision, is not immaterial. I do not refer to it as implying any doubt whatever of the jurisdiction, but when a Judge of Lord Eldon's experience states himself not to be aware of any case in which that jurisdiction had been practically applied, we may find an additional reason for the principle that nothing but the most clear and decisive proof of fraudulent representations, made under such circumstances as show that the contract was based upon them—such a case indeed as Lord Eldon in his experience had not known to occur—will justify the interference of a Court of Equity."

² "Though with some modification as to its extent, as," said the Chancellor, "it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the terms of the bill; striking out the word improvements, and leaving the word repairs. I give the plaintiff all that he asked by his bill, and I cannot give him less."

In Sir E. Sugden's last work, certainly not the least well written of his valuable productions, "*The Law of Property as administered in the House of Lords*," (p. 653, 64 Law Lib. 431,) he says in speaking of this case, "Lord Eldon's statement of what he considered to be the principle of the decree, cannot alter the facts of the case, and his own previous observation shows that he did not consider it a case of moral fraud, but one where, in the sense in which a Court of Equity uses the term, the representation was fraudulent. And such appears to be the real nature of the case. . . . The evidence of knowledge was, I think, quite sufficient to support the decree; but it also proved that the sellers *bona fide* believed themselves to have a good title after so long a possession; and indeed the title was one which it was highly improbable would ever be impeached. Sir W. Grant's position was, that if a vendor knows and conceals a fact material to the validity of the title, relief is to be afforded to the purchaser. That is the true rule. If the title is fairly before the purchaser, he must rely on his covenants. This rule does not require any representation. If the seller knows a material fact and conceals it, that is, does not divulge it, he is responsible; his motive is un-

This was followed by the great case of *Small v. Attwood*,¹ originally decided on the Equity side of the Court of Exchequer in 1832,² and on appeal in the House of Lords in 1838.³ There was little difference of opinion as to the rule of law, either in the Court of Exchequer or in the House of Lords, although the decree in the former, rescinding the contract, was reversed in the latter, the facts not being thought sufficient to support the charge of fraud,⁴ and Lord Brougham in delivering his opinion for a reversal of the decree, said, "If two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time

important; he is bound to give the purchaser the means of forming a judgment on the title, and is not to decide what he deems it necessary to disclose. Sir W. Grant did not, like the bill, put the case as one of gross fraud, although evidently, in the sense referred to by Lord Eldon, he declared the contract and conveyance to be fraudulent and void." This case of *Edwards v. McLeay* has been constantly cited as of the highest authority. *Van Lew v. Parr*, 2 Rich. Eq. 338; *Gans v. Renshaw*, 2 Barr, 34; *Gibson v. D'Este*, 2 You. & Col. N. S. 542; *Wilde v. Gibson*, 1 Cl. & Fin. N. S. 605, where Lord Campbell said there was no case of higher authority in the books; *Young v. Harris*' admr. 2 Alab. 112.

¹ In this case the amount of the purchase money was £600,000, and the costs, before the appeal was heard in the House of Lords, had amounted to £10,000. "The case," said Lord Brougham in delivering his judgment, "was without any example within the experience of the oldest man in the profession, in point of length and of complexity of detail, of the mass of matter with which it stands incumbered, and it is hardly exceeded by any cause of which there is any report in respect of the importance of the stake at issue."

² 1 Younge, 461.

³ 6 Clark & Finelly, 232, 531.

⁴ The facts in this case are so numerous and dependent, that it is difficult to do justice to them by an abridged statement. Indeed, in cases of this class, the question of misrepresentation on the one side, and diligence on the other, is so frequently a very delicate one, depending sometimes upon slight circumstances, and sometimes upon a combination of many circumstances, as to call for an examination of each case upon its own peculiar facts, and the utmost that can be done in a work like the present, is to refer

that he stated it not to be true, and if upon that statement of what is not true, and what is known by the party making it to be false, the contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contracts—an action of damages grounded upon the deceit, and there will be a relief in Equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party. In one case it is

to the principles of law which are generally conceded to prevail. The general features of the case were these:

Attwood was the owner of certain iron works, and Small and others represented the British Iron Company. Upon a proposition of sale being made to the latter, Taylor, an agent and large shareholder, viewed the works while Attwood was there, and upon his report three of the directors wrote to Attwood, proposing to buy the property for £600,000, payable by instalments, upon the understanding that every facility should be given to Taylor to ascertain the correctness of the representations that had been made to him. These directors subsequently examined for themselves, and then reported to the Company that they had concluded the treaty of purchase after the nature and capacity of the works had been fully investigated. Soon after, Taylor went there to reside as manager, and sent favorable reports to the Company. Some negotiations ensued respecting the completion of the title, pending which, the price of iron fell, and the Company then proposed, as a new term, that a deputation should go to the works to examine whether certain data given by Attwood to Taylor were correct. The visit was paid; and after communication with Taylor, who stated that although the calculations submitted to him by Attwood were too close to estimate profits upon with safety, still that they proved the data given by Attwood to be more favorable to the buyer than the seller, the directors reported that Attwood had redeemed his pledge, and the contract was executed with some abatement in the price. Six months after, the Company filed a bill to rescind the contract, on the ground of false statements made in papers submitted to Taylor, misrepresentations to the deputation, and concealment of faults. All these were denied by the answer, which declared that the representations were upon certain assumptions, and were general averages. The plaintiffs then amended their bill by striking out Taylor as a plaintiff, and making him defendant. In his answer, he denied all fraud and collusion with Attwood.

not necessary that all those three circumstances should concur in order to ground an action for damages at law, or a claim for relief in a court of Equity; I mean in the case of warranty given, in which the party undertakes that it shall in point of fact be so, and in which case, therefore, no question can be raised upon the *scienter*, upon the fraud or willful misrepresentation. In this case that is clearly out of the question; therefore all these three circumstances must combine: first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact;¹ and

¹ This proposition, although perfectly correct as stated in this application, must not be broadly construed, or there will appear to be a conflict of authority, which does not exist. Thus the expression in *Hunt v. Moore*, 2 Barr, 108, that "even if the party innocently misrepresents a fact by mistake, it is equally conclusive, as it operates as a surprise and imposition on the other party," is correct when the very subject-matter of the contract is the subject of the mistake. See *Miles v. Stevens*, 3 Barr, 37; *McCormick v. Malin*, 5 Blackford, 509; *Joice v. Taylor*, 6 Gill & Johns. 54. "It would seem to be sound doctrine," says Mr. Chancellor Kent, "that a substantial error between the parties concerning the subject-matter of the contract, would destroy the consent requisite to its validity;" 2 Com. 471. Viewed in this application, and also with reference to the distinction that equity will often refuse specific performance when it will not rescind, most of the cases can be harmonized. Thus applied, the remarks of Mr. Chief Justice Marshall in *McFerrand v. Taylor*, 3 Cranch, 281, cannot be questioned. There was a representation that the land which was the subject of the purchase, was situated on Kingston's fork, when in fact it was Slate's fork, where the land was less valuable; and it was said that from the situation of the parties and of the country, it was reasonable to presume that the vendor's apology that the misrepresentation was an innocent one, was true in point of fact, but the Court did not conceive that that fact would amount to a legal justification of the person who had made the misrepresentation. "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance. In this case, the defendant has sold land on Kingston, and offers land on Slate. He has sold that which he cannot convey, and as he cannot execute his contract, he must answer in damages." So in *Walters v. Mattingley*, 1 Bibb, 246; *Shackelford v. Harnley*, 1 Marsh, 500; *Dale v. Rosevelt*, 5 Johns. Ch.

thirdly, and chiefly, in my view of the case, that it should be this false representation which gave rise to the contracting of the other party.”¹

174; affirmed, 2 Cowen, 133, by the name of *Rosevelt v. Fulton*; *Champlin v. Layman*, 6 Paige, 189.

But when the contract is executed, and the purchaser seeks to rescind on the ground of *fraud*, it is apprehended that the proposition as stated by Lord Brougham, is supported by the authorities; for as was said by Lord Tenterden in *Polhill v. Walter*, 3 Barn. & Adol. 123, “If the defendant had good reason to believe his representation to be true, as for instance, if he had acted under a power of attorney which he supposed to be genuine, but which in fact was a forgery, (as in *Bree v. Holbeck*, Doug. 655,) he would have made no statement which he knew to be false; a case very different from the present, in which it is clear he stated what he knew to be untrue, though with no corrupt motive.” So in *Early v. Garret*, 9 Barn. & Cress. 928; *Ball v. Lively*, 4 Dana, 370; *Smith v. Babcock*, 2 Wood. & Minot, 246.

¹ This seems fully recognized by American authority; *Tuthill v. Babcock*, 2 Wood. & Minot, 301; *Warner v. Daniels*, 1 id. 90; *Mason v. Crosby*, id. 342. Where in *Winston v. Gwathmy's heirs*, 8 B. Monroe, 23, the subject of misrepresentation, though a spring of some value, was not a material element in the purchase, relief was denied. See *Crittenden v. Craig*, 2 Bibb, 474; *Parham v. Randolph*, 4 How. (Miss.) 433; *Smith v. Richards*, 13 Peters, 26, and the remarks of Ch. J. Marshall at the close of the decision in *McFerrand v. Taylor*, 3 Cranch, 282. In the absence, however, of evidence on this point, I presume a Court of Equity would be apt to conclude that if the misrepresentation were made, it had its effect to lead on the purchaser to complete the contract.

Lord Brougham, in his opinion, added that the inference he drew from the authorities was, that “general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to over-reach go for nothing; that an intention and design to deceive may go for nothing; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to over-reach were enough, I hardly know a contract, even between persons of very strict morality, that could stand. (See the remarks of Lord Thurlow in the familiar case of *Fox v. Mackreth*, 2 Bro. Ch. 420; and of Lord Eldon in *Turney v. Harvey*, 1 Jacob, 178; *Pothier de Vente*, n. 334, 295.) We generally find the case to be, that there has been an attempt of the one party to over-reach the other, and of the other to over-reach the first, but that does not make void the contract. (Thus, in *Donelson v. Weakley*, 3 Yerger, 178, it was held that mere statements by the seller of what the property would thereafter be worth,

The Earl of Devon, in delivering his opinion, held that there was no proof sufficient to fix Attwood with any definite statement of facts, so as to found thereon a charge of fraud and misrepresentation, and that the purchasers did not rely upon the statements made to them, but investigated for themselves.

Lord Cottenham was of opinion that the representations made were not intended to show the cost of producing iron at that particular time, but the average result of former years. The first point, therefore, he thought was, were the representations matters of fact or only speculative calculations for the future; secondly, were they, whatever they were, acted on by the Company; thirdly, were they true or false; and lastly, had any thing happened to deprive the Company of the right of insisting upon any inaccuracies in them. And he concluded that the purchasers considered the representations as averages for the time past, and not as definite statements of cost at that

afforded no ground for rescission, it being no part of that contract, and the matter being one fully within the vendee's own calculation. *Stray v. Peters*, 2 Root; *Bell v. Henderson*, 6 Howard, (Mississippi), 311. So of vague general representations, relating to matters open to the examination of all. *Anderson v. Burnett*, 5 How. (Miss.) 165; *Bell v. Henderson*, 6 id. 311; *Anderson v. Hill*, 12 Smedes & Marsh. 683. It is, in fact, no more than the application of the maxim, *simplex commendatio non obligat*. *Taylor v. Fleet* 4 Barb. 95.) It must be shown that the attempt was made, and made with success, *cum fructu*. The party must not only have been minded to over-reach, but he must actually have over-reached. He must not only have given instructions to the agent to deceive, but the agent must, in fulfillment of his directions, have made a representation; and, moreover, the representation so made must have had the effect of deceiving the purchaser; and, moreover, the purchaser must have trusted to that representation, and not to his own acumen, not to his own perspicacity, and not to inquiries of his own. I will not say that the two might not be mixed up together, the false representation of the seller, and the inquiries of the buyer, in such a way as even then to give a right to relief."

particular period; that they did not rely upon the representations, but having free access to all the books, satisfied themselves of the accuracy of the representations, and that with full knowledge of all the facts complained of, they for several months acted on the contract, and asked and obtained additional time for payment. He was unable, therefore, to perceive that fraud had been made out.¹

¹ Lord Lyndhurst, with whom agreed Lord Wynford, in defending the opinion he had delivered below, considered the law to be clearly settled, that where representations are made with respect to the nature and character of the property which is, to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised, and in a court of equity a foundation is laid for setting aside the contract, which was founded upon a fraudulent basis. "I do not understand," said he, "that that proposition is disputed by either of my noble and learned friends; it was distinctly laid down and decided in the case referred to in the judgment below, and which has been referred to at your Lordships' bar; I mean *Dobell v. Stevens*, 3 Barn. & Cress. 623. That was one of those ordinary cases which frequently come before the courts of common law. It was a case of the purchase of a public house; a false representation—false to the knowledge of the party making it—was made by the vendor with respect to the extent of the custom with respect to the quantity of beer that was drawn during a certain period. The books were in the house; it was part of the case that the purchaser might have had access to them if he thought proper; but, notwithstanding that circumstance, it being proved that the representation was false, the Court of King's Bench were of opinion that an action for damages might, under such circumstances, be sustained."

This case, however, was much more distinguishable from *Attwood v. Small* than Lord Lyndhurst seemed to suppose, as the vendor made a definite statement, which was intended to prevent the purchaser from making investigations which would have shown that statement to be false.

Dobell v. Stevens is fully supported by the recent case of *Hunt v. Moore*, 2 Barr, 107, where the representation was made that the incumbrances on the property were far less than they really were. "If the facts be as stated," said Rogers, J., with great propriety, "can a court of equity hold this to be a valid exchange? And why should it be so? Because, says the Court (below), it was her folly. The liens were of record, and she ought to have searched for incumbrances. Can it be the law that we are to repose no confidence in

Although the decision in this case in the Court below was reversed, yet, as has been said, there was

each other, without being branded with the charge of folly and losing the earnings of a lifetime. True, says the defendant, I told you a deliberate falsehood, but you ought not to have believed one word I said. Had you searched the records, you would have discovered it was all untrue. . . . I never can, and never will consent that any person shall be permitted in this court to take advantage of his own wrong. Had he been silent merely, perhaps, this plea would have availed him; although even in that case a court of equity would lay hold of slight circumstances to release a victim to such duplicity." So in *Napier v. Elam*, 6 Yerger, 108; *Campbell v. Whittingham*, 5 J. J. Marsh. 96.

In the broad sense in which the expressions are used by the civilians and adopted by us, there seems no distinction between the *allegatio falsi* and the *suppressio veri*. "I make no distinction," said Bayley, J., in *Early v. Garret*, 4 Man. & Ry. 690; S. C. 9 Barn. & Cress. 928, "between an active and a passive communication, for a fraudulent concealment is as bad as a willful misrepresentation. A fraudulent concealment from the seller of a fact which he ought to communicate, would undoubtedly vitiate the sale." See *Pearson v. Morgan*, 2 Bro. Ch. R. 390. It is said by Mr. Justice Story that "the true definition of undue concealment which amounts to a fraud in the sense of a court of equity, and from which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other." 1 Story's Eq. § 207; *Young v. Burnham*, 1 Freeman's Ch. 241. But the question of what the vendor ought to inform the purchaser of, and what he is under no such obligation to do, will sometimes be a difficult one. It was well said in *Bean v. Herrick*, 3 Fairf. 262, that "the maxim *caveat emptor*, is a sufficient answer to mere silence in regard to defects open to observation, but the line which separates cases where this maxim applies, from others which call for relief, is not defined with precision; each case rests upon its peculiar circumstances." The question will often depend much upon the basis of dealing between the parties. "The Court in many cases," said Lord Eldon in *Turner v. Harvey*, Jacob, 178, "has been in the habit of saying, that where parties deal for an estate, they may put each other at arm's length, and where incumbrances are matter of record, or are patent, and the purchaser views for himself, it is apprehended that equity will not rescind on the ground of mere silence on the part of the vendor." This distinction between the *allegatio* and the *suppressio*, was observed in *Richardson v. Bright*, 9 Verm. 368, where the incumbrance was of record, and, it was said, that if the vendor had notice, and used no means to prevent knowledge to the purchaser, who had the means of informing himself within his power, it was no fraud—he was not bound to inform him.

The converse of the position stated above is equally true, for, as was said by Lord Eldon, in the case just cited, in referring to the remarks of Lord

little or no difference of opinion as to the law which should govern it, and Sir E. Sugden remarks,¹ that to the rule of law, as qualified and explained in the House of Lords, no exception can be taken, and he adds, with great propriety, "there is no part of the jurisdiction of a court of equity which requires to be executed with more caution than that of rescinding a contract. This we shall see powerfully exemplified in this very case of *Small v. Attwood*. If there be fraud, the remedy is clear of difficulty. But the Court ought to be quite sure of the grounds upon which it decides, for by rescinding the contract it may do irreparable damage to one party, whilst, by refusing to interfere, it does not deprive the other party of his remedy, by an action of deceit, if he really have been deceived."²

Thurlow in *Fox v. Mackreth*, 2 Bro. Ch. R. 420, "if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it. He acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of the principle. If a single word is dropped which tends to mislead the vendor, that principle will not be allowed to operate."

¹ Sugden's Law of Property, 598.

² The insertion of the following remarks of that learned author, after a masterly condensation and review of the facts in the case, seems to be appropriate. "I thought at one time, from its complicated facts, that it could hardly, perhaps, be cited as an authority for any thing beyond the general principle: but I felt bound to put the reader in possession of a general view of the case, and my present calm review of it has satisfied me that it is a precedent of much importance. It affords an excellent commentary on the rule of law, and exemplifies the process by which we are to arrive at a just conclusion. The opposite views taken of the particular evidence is not important, but the principles by which the House of Lords were guided, are, indeed, important. Previously to this case, the instances were rare in which a purchaser, on the ground of misrepresentations prior to a written contract, which was silent on that head, and, after inquiry, and with means of knowledge and possession, had applied to a court of equity to rescind the contract. If the decree had remained undisturbed, followed as it was by an

In the subsequent case of *Vigers v. Pike*,¹ the plaintiffs having filed a bill to compel payment of a residue of the purchase money, the defendants filed a cross bill for relief on the ground of misrepresentation and fraud. The subject of the contract was a lease of mines, which the defendants had entered upon and worked for three years. The cross bill was dismissed in the Irish Court of Chancery, and upon appeal taken to the House of Lords, the decree was affirmed, the Chancellor observing, that in a case depending upon alleged misrepresentations as to the nature and value of the thing purchased, the defendant could not adduce more conclusive evidence or

injunction operating on the funded property into which the purchase money had been invested, no doubt many such experiments would have been made. But the decision of the Lords placed the doctrine on the right foundation. Fraud is a sufficient ground for relief, but it is not to be made out from ambiguous papers where the parties investigated the books and accounts, and inquired for themselves, and with possession and full means of knowledge, delayed for some months to apply for relief. Indeed, it is manifest that the same conclusion would have been arrived at, if the application had been made at an earlier period. The danger of resting upon such evidence as was produced in this case to impeach the written contract, is proved by the opposite views of the very learned persons who gave judicial opinions upon the force and effect of it; but the Lords in effect decided, that where there are ample means of forming a judgment from written papers and correspondence, much credit is not to be attached to alleged conversations and exclamations, particularly if they are not distinctly charged in the bill, so as to enable the other party to meet them." In the last edition of the learned author's work on Vendors and Purchasers, (vol. i. p. 383), he had remarked, that "it was not too much to expect, that if, in a contract of such magnitude, in which, of course, there was previous inquiry, the purchasers bought on the representation of the seller as to the cost of producing pig iron, they should have required him to bind himself *by the contract* to those representations, and to agree to reduce the purchase money if they proved to be incorrect. Such a simple precaution would have prevented the vast litigation in that case; but it is clear, that if such a demand had been made, it would not have been acceded to, and that if it had been refused, the purchasers would have executed the contract without it."

¹ 2 Drury & Walsh, 1; on appeal to the House of Lords, 8 Clark & Finelly, 562.

raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or after full information concerning them continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines.¹

In the recent case of *Gibson v. D'Este*,² the question was whether a purchaser was entitled to rescind an executed contract because of the omission to mention to him the existence of a right of way over part of the grounds in front of the house. The former owner of the property having complained of this right of way as a nuisance, had obtained permission from the parish to enclose it in, acknowledging by a deed that the enclosure was made by consent of the parish—agreeing that the walk should be re-opened by her on seven days notice—that its line should be designated by proper mark stones—that she would keep open another road in a different direction, and would pay five shillings annually to the parish, by way of

¹ See accordingly, *Pintard v. Martin*, 1 Smedes & Marshall Ch. R., 134. 1 Story's Equity, sec. 203, a; *Cunningham v. Fithian*, 2 Gilman, 650. Length of time, however, will of course be no element to bar the plaintiff from relief, if he has acted promptly upon the *discovery* of the fraud. *M'Lean v. Barton*, Haring Ch. 379. In the much litigated case of *Whitney v. Allaire*, 4 Hill, 484, 4 Denio, 554, 1 Comstock, 313, it was held that the plaintiff might rescind the contract, or recover damages for fraudulent representations as to the territorial extent of the premises, although he might have gone on and affirmed the contract; and even after discovery of the fraud, he might recover the actual damages sustained by reason of it, although he could not then rescind the contract.

² 2 Younge & Collier, New Series, 542; on appeal to the House of Lords, 1 Clark & Finelly, New Series, 605; reported there under the name of *Wilde v. Gibson*; Mademoiselle D'Este the appellant, having married Sir Thomas Wilde, now Lord Truro, and Chancellor. This case is well condensed in Sugden's Law of Property, as administered in the House of Lords, p. 615, and the reversal of the decree of the Vice Chancellor severely criticized by him at great length.

acknowledgment. A pale fence was then erected, enclosing in two places so much of the way as traversed the grounds, and shortly after, three mark stones were placed in a direction supposed to designate the original line of way. These stones were outside of the pale fence, and in fact, on the line which divided the parish from an adjoining town. The substituted road was kept open, and the rent regularly paid by her, and after her death, by her daughter, who became the owner. The latter employed a surveyor to lay out the property into building lots, and her solicitor and agent informed the surveyor of the claim of the parish to the way, and that its line was marked with stones. The surveyor, among other things, planned a road, which was to comprise the line of this way, and the whole property was then laid out into lots with this road running through, and thus sold. The abstract did not refer to the agreement with the parish, as the road was supposed to have included the way, nor was the purchaser informed by the agent of these circumstances. The parish soon after claimed their half-yearly rent, which the purchaser refused to pay, and filed a bill to rescind the contract on the ground of fraudulent concealment. No charge of personal fraud whatever was made on the argument against the defendant, nor was there any evidence that she knew of the deed which her mother had executed, or of the existence of the way, or that she knew particularly of the payments of the rent, except that they appeared in the accounts rendered to her by her agent.¹ Under

¹ It should be observed that these payments did not so specifically appear in the accounts as to convey definite information to the owner as to the ground of their payment.

these circumstances, the Vice Chancellor decreed that the sale should be rescinded with costs, being of opinion that the contract and its completion took place under concealment from the purchaser and substantially under misrepresentation to him of material facts within the knowledge of the defendant or her agent, whose knowledge for the present purpose was to be held equivalent to her knowledge, but not within the knowledge of the plaintiff, he being without the means of knowing the true state of these facts.

But this decree was reversed in the House of Lords,¹ principally, as it was said, on the ground that the doctrine of constructive notice to the defendant, from the knowledge of her solicitor, could not be applied to the case. "The effect of constructive notice," said Lord Cottenham, in delivering his opinion, "in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal: but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together—there can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge."² With this opinion Lord

¹ *Wilde v. Gibson*, 1 Clark & Finelly, New Series, 605.

² His Lordship further said, that the decree could not be supported on the authority of *Edwards v. McLeay*, (*supra*, p. 463,) "for in that case there

Brougham entirely concurred; and Lord Campbell thought it was necessary to observe strictly the difference between the rules which apply to a contract still executory and one actually executed. "If there be in any way whatever," said he, "misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside." He entirely dissented from the position that an action of deceit could be maintained without positive fraud, and said that there was no evidence that the solicitor of the vendor received any knowledge of the direction of the road, or of the deed of the vendor's mother, in the course of his agency. "The knowledge, then, amounts to

was knowledge in the vendor and a false representation, both of which are wanting in the present case. A case much more in point is that of *Legge v. Croker*, 1 Ball & Beat. 506, in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out that there was a footway, the presentment applying only to a carriage way, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved from the lease; but Lord Manners dismissed his bill, saying: "If there were a willful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law, in asserting that there existed no right of way; it cannot be called a misrepresentation. That was a much stronger case against the lessor than the present is against the vendor."

nothing. He had no knowledge which would show that he was guilty of a fraudulent misrepresentation.”¹

¹ The strictures of Sir E. Sugden, in his late work, upon the reversal of the decree of the Vice Chancellor, are very severe.

“It does not seem to be correct,” said he, “to compare this with the common case of constructive notice. If I honestly buy an estate without notice of an incumbrance, yet if my agent knew of it, or there were sufficient circumstances to lead me to inquire, I am bound by this constructive notice. This is, no doubt, very hard; for I am bound by an incumbrance of which I really had not notice. But does this apply to a case, where an owner of an estate in possession pays interest or rent, under a charge created by the person under whom he claims as a volunteer—a charge which he cannot displace, and which he must satisfy. The notice runs as it were with the charge. The payment by an agent cannot weaken the case where the agent knows why he pays, and the receiver knows why he is entitled to receive. The owner does not think fit to inquire why the payment is made, although marks to support the right are set up on the estate, and the deed creating the charge is in the custody of a person in the town who holds out for his benefit, and the right is a public one, and publicly claimed at intervals. The neglect to inquire does not impeach the charge or weaken the effects of the payments. The question does not appear to be whether the perusal of the deed, or the entry of the payments would show the precise line of road, but whether the deed and payments which bind the owner to the actual line of road, are not as, between him and a purchaser without notice, conclusive evidence that the seller knew, as he was bound to know, the exact rights which were secured by the deed and acknowledged by the payments. On the one hand, to fix an owner under such circumstances, with that which he is bound to know inflicts no injury. It renders him neither more nor less liable. But to consider these circumstances as conveying to him no notice of the real nature of the charge, is to enable him upon a sale to throw the burden off from his own shoulders, and to cast it upon those of an innocent purchaser, who was in no manner liable to it. . . . Very slight evidence, if any were required, ought to be sufficient to fix the owner of an estate, with the knowledge of an actual charge on his estate, his liability to which admits of no dispute. The charge of personal fraud not sustained, where not essential to the relief, may properly have an effect upon the *costs*, but not upon the merits. The case in the Lords seems to have been decided solely on the absence of deceit, on the absence of personal fraud on the part of the vendor, and on the want of sufficient knowledge on the part of her and her agents; and upon these grounds it is submitted that the judgment cannot be supported.”

“It is also worthy of notice, and seems,” says the learned author, “to have escaped all attention, that the defendant covenanted that notwithstanding any act done by herself or her mother, the former owner, she was seized of “all and singular the lands, hereditaments, mansion house, and premises conveyed, of a perfect and indefeasible estate of inheritance in fee simple

The foregoing cases in the House of Lords have been referred to at some length, both on account of their intrinsic importance, as decisions in the court of last resort in England, and because they show, as conveniently as any other class of cases, the principles by which the rescission of executed contracts are to be governed in cases of improper concealment or misrepresentation. It will have been perceived that the difficulty which such cases present consists not so much in the principles themselves, as in their application.

The exception, however, recognized by this class of cases seems to be the only one to the well settled rule that the purchaser's right to relief, after the execution of his deed, depends solely on the covenants for title which that deed contains, and hence the question arises how far the purchaser is allowed to detain the unpaid purchase money, or to recover it back, if already paid, or to have the aid of a court of Equity in furtherance of these ends, where there is a defect or incumbrance which is covered by the covenants for title which he has received; in other words, as in the absence of covenants the purchaser can have no relief as to the purchase money, how far the presence of covenants entitles him to relief.¹

in possession, without any manner of condition, qualification, restriction, matter or thing whatsoever, expressed or implied, and which could revoke, determine, abridge, qualify, alter, charge, incumber, or prejudicially affect the same in any manner aforesaid," with the other usual covenants following. Now, can a more distinct representation of a seizin in fee, not controlled by any deed executed by the mother of the vendor, be framed?"

But it is probable that instead of this fact having escaped the attention of the able counsel in this carefully argued case, it was not deemed a proper subject of attention, as it is believed that covenants for title are not properly to be regarded as *representations* in the sense in which that word is used in this connection.

¹ Upon this branch of the subject of this work I may be permitted to

The cases upon this subject will be found far more numerous in this country than in England, for which there are obvious reasons. The almost universal practice there of limiting the covenants for title to the acts of the vendor, his ancestor, or the last person claiming by purchase in its popular sense, necessarily confines such questions between much fewer parties than where, as in parts of this country, it is not unusual for purchasers to demand and receive general covenants for title. Where the covenants are general, the whole previous question of title is thrown open. The vendor covenants that he is seized of an inde-feasible estate—that it is free from all incumbrance—or that he will warrant and defend it to the purchaser against all persons whomsoever. Hence, any defect or incumbrance, no matter by whom caused, or how far back in the chain of title, can raise a question which, in England, could only arise where the defect was created by a single person, that is, the vendor, or perhaps his ancestor or testator.

The cases which are to be found in the English books as to payment of the purchase money depend almost entirely on questions which arise before the execution of the deed, and are most frequently presented upon a bill filed for specific performance of the contract;¹ and even where questions arise after its

recall the words of Lord Eldon, that “fewer cases turn upon greater niceties than those which involve the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedies,” (*Turner v. Harvey*, Jacob. 169,) and the expression of Mr. Chancellor Kent, that on this subject “the law does not seem to be clearly and precisely settled, and it is difficult to reconcile the cases or make the law harmonize on this vexatious question.” 2 Com. 471.

¹ The English cases as to specific performance of contracts of sale of real estate are very well collected and arranged in Mr. Dart's recent treatise on Vendors and Purchasers, pp. 457-548.

consummation, the subjects of controversy are much more restricted than in American cases; for in England, where the covenants are limited to the acts of the vendor, he is very apt to be aware of any defects or incumbrances of his own creation, and hence questions as to the purchase money, after the execution of the deed, chiefly turn, as has been just seen, upon the point of knowledge and concealment by him, or the neglect of provident vigilance on the part of the purchaser. But where, as in parts of this country, general covenants are often given, and sometimes even regarded as a substitute for examination of the title, many cases must arise where the question of concealment is not presented, as the vendor cannot be aware of every defect which any previous owner may have caused.

Before considering particularly the cases which allow a purchaser to detain his purchase money by reason of defects or incumbrances, it may be proper briefly to advert to the principles on which such a right is based.

It is familiar that the system of the common law did not recognize the propriety of settling cross demands in the same suit. The object of each action was to determine the rights of the plaintiff as to the particular subject of his demand, without regard to any claim which the defendant might have, growing out of the transaction; and it was not until comparatively modern times, that courts of law were enabled by the statutes of bankruptcy,¹ and the statutes of set off,² to give to a defendant any redress except by

¹ 4 Anne, c. 17; 5 Geo. I. c. 11; 5 Geo. II. c. 30; 46 Geo. III. c. 135; 6 Geo. IV. c. 16.

² 2 Geo. II. c. 22; 8 Geo. II. c. 24.

means of a cross action; and although courts of equity had, before this time, been in possession of the more liberal doctrine, (which was familiar to the civil law by the term compensation,) their jurisdiction seems to have been little defined.¹

It was some time before the spirit which led to these statutes infused itself into cases which did not come within the letter of their enactment. Thus with respect to personal estate, the purchaser of a chattel was not allowed, in an action for its price, to set up, as a defence, a breach of warranty either as to quality or title, but was forced to pay the amount, and driven to a cross action by which to establish his own claim.² It is not necessary here to analyze the train of decisions which have departed from this severity of rule, and have finally established the principle, both in England and in most parts of this country, that a purchaser may, in a suit brought for the purchase money of a chattel, take advantage of the breach of warranty as a defence, not as a technical set-off, but as evidence of failure of consideration and in mitigation of damages. Such a doctrine was at first totally denied—then a distinction was taken, as to its admissibility as a defence, between actions brought to recover the contract price, and actions

¹ See 2 Story's Eq. Jurisp. c. 38, on Set-off; and the very recent case of *Freeman v. Lomas*, 15 Jurist, 648; 5 English Law and Equity Rep. 120.

² See the cases cited in *Basten v. Butter*, 7 East, 480; and per Lord Ellenborough in *Farnsworth v. Garrard*, 1 Campb. 39; *Crowninshield v. Robinson*, 1 Mason, 93; *Thornton v. Wynn*, 12 Wheat. 183. In *Moggridge v. Jones*, 3 Camp. 38; and 14 East, 486, Lord Ellenborough applied the old rule to a case where the consideration of a bill of exchange was the execution of a lease. The defendant was let into possession, and the plaintiff then refused to execute the lease. It was held that this was no defence to the bill—that the defendant had his remedy upon the agreement.

brought on securities given for that price;¹ then the defence was admitted when it went to the whole consideration, but rejected when it touched only a part,² until finally the principle seems well settled, as has been stated.³

It is difficult, however, to say under what precise head such a defence is to be classed. It could not in strictness come under the head of set-off, for the purchaser's rights, in general, sound in unliquidated damages, which do not come within the scope of the statutes of set-off. It has been admitted, moreover, in cases where failure of consideration was not in point.⁴ In England, it has very lately been held, that such a defence is not by way of a cross-action, but by showing how much less the subject-matter of the contract was worth, by reason of its breach,⁵ while in New

¹ *Morgan v. Richardson*, 1 Campbell, 40; *Tye v. Gwynne*, 2 id. 346; per Denison, J., in *Robinson v. Bland*, 2 Burrow, 1082; *Mann v. Lent*, 10 Barn. & Cress. 877.

² *Templer v. McLachlan*, 5 Bos. & Pull. 136; approved by *Shaw v. Arden*, 9 Bing. 287; *Day v. Nix*, 9 Moore, 159; *Pulsifer v. Hotchkiss*, 12 Connect. 234; see *McAlpin v. Lee*, id. 129.

³ *Allen v. Cameron*, 3 Tyr. 907; *Poulson v. Lattimore*, 9 Barn. & Cress. 259; *Street v. Blay*, 2 Barn. & Adol. 456; *Mondel v. Steele*, 8 Mees. & Welsb. 858; *Herbert v. Ford*, 29 Maine, 546; *Reed v. Prentiss*, 1 N. Hamp. 176; *Sheppard v. Temple*, 3 id. 458; *Britton v. Turner*, 6 id. 481; *Elliott v. Heath*, 14 id. 131; *Dodge v. Tileston*, 12 Pick. 328; *Harrington v. Stratton*, 22 id. 510; *Perly v. Balch*, 23 Pick. 284; *Goodwin v. Morse*, 9 Met. 279; *Dorr v. Fisher*, 1 Cushing, 272; *McAllister v. Reab*, 4 Wend. 489; *S. C.* 8 id. 189; *Batterman v. Pierce*, 3 Hill, 171; *Whitney v. Allair*, 4 Denio, 557; *Steigleman v. Jeffries*, 1 Serg. & Rawle, 478; *Patterson v. Hulings*, 10 Barr, 507; *Peden v. Moore*, 1 Stew. & Porter, 71; *Mercer v. Hall*, 2 Texas, 284; *Withers v. Greene*, 9 Howard, (U. S.) 214; *Van Buren v. Digges*, 11 id. 461, overruling *Thornton v. Wynn*, 12 Wheat. 183. See *Sedgwick on Damages*, c. 17, and the able notes to *Chandelor v. Lopus*, 1 *Smith's Leading Cases*, 202; and *Cutter v. Powell*, 2 id. 28, (Amer. Ed.)

⁴ *Ives v. Van Eppes*, 22 Wend. 155.

⁵ *Mondel v. Steele*, 8 Mees. & Wels. 858

York it has somewhat recently received the name of recoupment.¹

But by whatever technical term such a defence may be called—whether it be compensation, set-off, failure of consideration, or recoupment—the principle on which it is based is the same as that which led to the statutes of set-off, viz., that of preventing circuitry of action, and however much the common law rules of pleading may have rejected those defences which militated against singleness of issue, it has been found, in modern times, less inconvenient to determine in the same action as well the rights of the defendant as those of the plaintiff, than to oppress courts and parties with different suits, springing from the same subject matter.

In considering the rights of the purchaser, at law, it may also be remarked, that according to the rules of the common law, if purchase money of real estate were secured by bond, or any other sealed instrument, no defence whatever could, in the absence of illegality of consideration,² be admitted to its payment, even where the title to the land had utterly failed and the purchaser been evicted from its possession. There could be no defence on the ground of failure of consideration, for the seal imported a consideration, which the purchaser was estopped from gainsaying;³

¹ The subject here so briefly and incidentally touched upon, will be found very fully and ably considered in the American notes to the cases of *Chandelor v. Lopus*, and *Cutter v. Powell*, 1 and 2 Smith's Leading Cases; and in a chapter on Recoupment in Sedgwick on Damages; see also 2 Kent's Com. 470, &c., last edition; *Withers v. Green*, 9 Howard, 214.

² Fraud would be no defence, unless the fraud related to the execution of the instrument.

³ *Vrooman v. Phelps*, 2 Johns. 178.

nor could there be a defence by way of set-off, for the reasons above stated, viz., that the purchaser's rights sounded in unliquidated damages. Hence, there could be no defence at common law to the payment of purchase money, when secured by a specialty, unless where illegality had in some way entered into the contract. The only remedy was by recourse to equity.

In America, however, the common law rule as to the solemnity of a seal, has in some States been relaxed by statutory provisions, so far as to entitle the obligor of a bond, under some restrictions, to show, by way of defence, its failure, as he formerly could have done, its illegality of consideration; and where such is the case, it is immaterial, so far as this question is concerned, whether the purchase money be secured by a specialty, or by a bill or note.

Apart from the form in which the contract is expressed, it would seem immaterial whether the position assumed by the purchaser be that of a defendant resisting payment of the purchase money, or that of a plaintiff seeking to recover it back in an action for money had and received; as there would seem to be no reason on principle, why, if the purchaser have a right, permanently to detain unpaid purchase money on the ground of a defect of title, he should be prevented from recovering back that for which he has received no value. But the position of the purchaser of real estate, as a plaintiff, must, at law, necessarily be confined to a suit upon the covenants in his deed, which suit, (though the same end may be obtained by means of it), depends, to some extent, upon different principles and machinery from an action which seeks to rescind the contract, and recover back its consideration. Hence it may be

safely said, that at law, a purchaser has no right, after the execution of his deed, to recover back his consideration money on the ground of a defect or failure of title. His remedy in such case is by an action of covenant, and not by an action of assumpsit.¹ But when the position of the purchaser is that of a defendant, although "the technical rule remits him back to his covenants in his deed,"² yet it is often thought to be useless and wrong to compel a purchaser to pay over purchase money, which he might the next day sue for in the shape of damages, and hence, to prevent circuity of action, the defence at law of a failure of title, has been in some cases allowed.

It is not strange, that where there has been no uniform legal principle under which such defences as those now treated of have been classed, there should have been some discrepancy in the various cases as to the grounds of their decision. As the authorities generally seem to treat the question, in a court of law, as one arising from failure of consideration, it becomes necessary to inquire what the consideration for the purchase money of real estate actually is. Although the mere receipt of the deed, comprising certain covenants for title, does not, unless in peculiar cases, of itself form a consideration,³ yet, as has been

¹ In *Miller v. Watson*, 5 Cowen, 195, the plaintiff proved a promise on the part of his vendor, who had sold to him with a covenant of warranty, to repay the consideration money, as the title had failed, but the Court held that there having been no eviction of the plaintiff, the promise was without consideration, and that the plaintiff's only remedy was on the covenants in his deed.

² 2 Kent's Commentaries, 473.

³ In an early case in Maine, *Lloyd v. Jewell*, 1 Greenleaf, 353, the defendants were sued on one of several notes given by them for the purchase

mentioned, the absence or presence of these covenants, or of some of them, have a very material bearing upon

money of real estate, which the plaintiff had conveyed with covenants for seizin, against incumbrances, and of warranty, with a condition that the grantees should not recover of the grantor for the breach of those covenants any greater or further sum than the consideration with interest, payable in cash, to the amount received on said notes, and the residue by delivering up to be cancelled such of the notes as should remain unpaid. The defendants proved that the plaintiff had no title to a specific part of this land, which was in the actual adverse possession of the lawful owner, and that the value of this part exceeded the amount of the note in suit. A verdict having been found for the defendants, it was argued for them, on a motion for a new trial, that both on general principles, and from the construction of the deed, which seemed framed to meet such a case, the verdict should be allowed to stand; but Mellen, Ch. J., who delivered the opinion of the Court, said that the Supreme Court of Massachusetts had for a long series of years proceeded upon the principle, that *the covenants* in a deed of conveyance, (or if no deed had been given, but only a bond or covenant to give a deed, then *such* bond or covenant) constituted a valuable consideration for the note, and that the want or failure of title would be no legal defence; and acting upon this supposed train of decision, which, it was said, laid down the true principle of law, it was held that the defendants, having received such covenants, could have no defence to the payment of the notes. It was further said, that whatever claim the defendants might have was upon their covenants, and that to allow them in that action of assumpsit thus to defend themselves, would be to give them a greater right as defendants than they could have as plaintiffs. It was further suggested that a difficulty might arise in the way of such a defence from the measure of damages, which in that State were fixed, on a covenant of warranty, by the value of the land at the time of eviction, which might be much greater or less than the purchase money; and lastly, it was said that if such a defence were allowed in that action, not only would there be nothing on the record to prevent the recovery of damages upon the covenant for the very defects for which an allowance had thus been made, but nothing on which the payee of the note could found an action against his own warrantor.

It has, however, been since denied in Massachusetts, that any such course of decision as that referred to by the Court in *Lloyd v. Jewell*, ever prevailed in that State. The case of *Fowler v. Shearer*, 7 Mass. 19, and *Phelps v. Decker*, 10 id. 279, merely contained loose dicta, and the doctrine that the covenants in an executed deed, or the articles themselves in an executory contract, formed so valuable and conclusive a consideration as to preclude all question as to the title, seems opposed to principle and authority. See *Knapp v. Lee*, 3 Pick. 459; *Rice v. Goddard*, 14 id. 293; *Frank v. Vinson*, 20 id. 110; *Tillotson v. Grapes*, 4 New Hamp. 448; *Cook v. Mix*, 11 Connect. 432.

the question. Thus, when the deed contains no covenants, the purchaser is wholly without remedy; for the consideration was the mere transfer to him of the estate of the vendor, who was to be in no way responsible for the title, and if the deed be delivered to the purchaser, he has received the entire consideration for which he bargained, entirely irrespective of any future events, and the question of good or bad title is irrelative. Where the covenants are limited to the acts of the vendor, the consideration would seem to be the present transfer of his estate, in the same condition as that in which he himself received it, and the future performance by himself and his

With respect to the other grounds of the decision in the case of *Lloyd v. Jewell*, it may be observed, that the objection as to the measure of damages seems wanting in application, since, if circuity of action is to be avoided, it is as competent and as convenient for the jury to assess the damages by any standard in that action, as in one in which the vendee were the plaintiff. *Tillotson v. Grapes*, 4 New Hamp. 448.

The objection on the ground of there being nothing to prevent the defendant, after having received a reduction of damages, by reason of the defect, from turning round and suing upon the covenants, and thus obtaining a double compensation, would equally well apply to every other case of set-off, especially where its subject was not embodied in a special plea, but, as is usual in American practice, (and as was also not unfrequent in England before the new rules), contained in a notice and given in evidence under the general issue. It is obvious, as was said in *Tallmadge v. Wallis*, 25 Wend. 116, that the effect of setting up such a defence would operate as an estoppel to the purchaser, if he should attempt to bring an action for a breach of warranty, after he had been once satisfied for his damages in this manner; or if the jury found a verdict which, in terms, or by necessary implication, negatived the existence of the facts set up in this plea. The later cases in Maine do not appear to support the reasoning adopted by the Court in *Lloyd v. Jewell*, but treat the case as having decided merely that a *partial* failure of consideration was no defence to an action on the contract price. *Wentworth v. Goodwin*, 21 Maine, 154; *Jenness v. Parker*, 24 id. 294; *Herbert v. Ford*, 29 id. 554; and in the last of these cases, the tendency of modern decisions to allow a broader latitude of defence for the purpose of avoiding circuity of action, was recognized with approbation, and the principle applied.

heirs, when necessary, of the undertaking, that the purchaser and those claiming under him shall not suffer from any of his or their acts.¹ The consideration is thus two-fold: one which moves from the vendor at the time of the execution of the deed, and the other, which is executory, or, as it may be called, a continuing consideration. Where a defect has been caused by any one in the chain of title prior to the vendor, this can form no defence to the purchaser from payment of the purchase money, for the consideration between himself and his vendor is not affected.

Where the covenants are unlimited or general, the consideration seems to be the present transfer of the vendor's estate, and the future performance by himself and his heirs, when necessary, of the undertaking, that the purchaser and those claiming under him shall not suffer from any of his or their acts, or from the acts of any one prior to him in the chain of title. Hence it may be possible for any defect or incumbrance whatever, whether caused by the vendor or his predecessors, to touch the consideration between himself and the purchaser.

In the application of this principle it follows that where the only covenants in the deed are of warranty or for quiet enjoyment, which are broken only by an eviction, actual or constructive, the only difficulty will be in determining whether there has or has not been an eviction, within what is conceived to be the true meaning of the term. If there has, the pur-

¹ The analogy between the sale of real estate with covenants, and the sale of chattels with warranty, has already been noticed, and Lord Tenterden, in *Street v. Blay*, 2 Barn. & Adolp. 456, said that the plaintiff's *compliance with his warranty* was part of the consideration for the contract price.

chaser would be at that time entitled to recover damages upon these covenants, and circuitry of action is clearly prevented by permitting him when sued for the purchase money, to call upon the plaintiff to perform his covenant in that action; in other words, by allowing the former to defend himself to the extent of the measure of damages; or, if the opportunity to do so has not been presented in a court of law, he can have recourse to equity, which, in the exercise of a familiar jurisdiction, can, by its varied machinery, ascertain the mutual rights of the respective parties, and mould its decrees accordingly, by enjoining the collection of the purchase money, either temporarily or permanently, by awarding issues of *quantum damnificatus*, and by such other means and under such equitable conditions, &c., as the exigencies of the case may require.

If, however, there has been no such eviction as would entitle the purchaser at that time to damages, it is apprehended that where the covenants of warranty or for quiet enjoyment are the only ones in the deed, no such defence can be permitted at law, and no ground exists on which to found an equitable jurisdiction. Where the deed contains a covenant for seizin, cases of difficulty may often arise, except in those States in which this covenant is held to be fully satisfied by the transfer to the purchaser of a present possession.¹

It has been said, in a former chapter, that in suing upon this covenant, cases may occur in which although the purchaser may have paid nothing to

¹ See *supra*, p. 37, *et seq.*

buy in the paramount title, and may still be in possession, yet the failure of title is so complete, and the loss so morally certain to happen, that a Court might be authorized in directing the jury to assess the damages by the consideration money, or a proportionate part of it, and that in such cases it might be proper and even necessary for the plaintiff, to offer to reconvey the interest or title actually vested in him, and that although it would be no bar to his recovery that he had not done so, yet that the Court might stay the execution or reserve the actual entry of the judgment till such reconveyance were made.¹ It is difficult to say how far these principles can be made to apply to actions where the defendant seeks to detain purchase money under similar circumstances. On the one hand, there are reasons growing from the desire to prevent circuity of action, and the injustice that may often arise by reason of the delay, expense, and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the other, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, and clothe them with every imposing circumstance, is such as may cause a preponderance in favor of the rule that unless there has been a *bona*

¹ *Supra*, p. 83. Where there is a covenant for seizin can there be, as to this question, no difficulty by reason of its want of capacity for being taken advantage of by an assignee. The question of detention of the purchase money can never arise between a vendor and the heir or the assignee of a vendee. It may arise between the vendor or his representatives, and the personal representatives of the vendee; and, in such case, the latter, who are the proper defendants in an action for the purchase money, are also the parties in whom alone the right of action on the covenant has vested, and are therefore capable of setting up the breach of this covenant as a defence.

fide eviction, actual or constructive, the parties must be respectively left to pursue the remedies which they have originally provided for themselves.

It is hoped that these introductory remarks may to some extent help to simplify the arrangement of the numerous cases upon this branch of law, which seems a perplexed and intricate one, rather from the fact that the grounds of the decisions have not always been referred to the same principles, than from any difficulty as to the principles themselves.

It is proposed to consider, in the first place, the rights of the purchaser as they have considered in courts of law, and secondly, in courts of equity.

The earliest prominent case in this country, as to the purchaser's right in a court of law to detain the purchase money of real estate by reason of a defect of title, seems to have been *Frisbie v. Hoffnagle*,¹ decided in New York in 1814, where in an action on two notes given for the purchase money of land sold with a covenant of warranty, the defendant proved that the land had subsequently been sold under a judgment against the plaintiff, and a sheriff's deed made to the purchaser, and although it was also in evidence that the defendant had not been evicted or disturbed in his possession, the Court ordered a nonsuit. On a motion for a new trial, the case was submitted without argument, and in refusing the new trial, it was held, *per curiam*, "The consideration for the note has entirely failed, for the defendant has no title, it having been extinguished by the sale under the judgment. Here is a total, not a partial, failure of consideration, for although the defendant

¹ 11 Johns. 50.

has not yet been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the mesne profits.¹ To allow a recovery in this case would lead to a circuitry of action; for the defendant, on this failure of title, would be entitled immediately to recover back the money. The motion to set aside the nonsuit must, therefore, be denied."

The objection to the soundness of this decision, (which has since been repeatedly overruled),² appears

¹ Citing *Morgan v. Richardson*, 1 Campb. 40, note; *Tye v. Gwynne*, 2 id. 346; *Barber v. Backus*, Peake's cases, 61; *Phoenix Ins. Co. v. Fiquet*, 7 Johns. 383.

These cases can hardly be said to be authority for the length to which this decision goes. The case of *Morgan v. Richardson* is merely to the point that a total failure of consideration as to quality of goods, for which a bill of exchange had been given, was a good defence to an action on that bill, though a partial failure would not be. *Tye v. Gwynne* was the case in which Lord Ellenborough took the distinction between want of consideration and failure of consideration, and recognized that taken by Denison, J., in *Robinson v. Bland*, 2 Burr. 1082, between an action brought on the contract and on the security given for the price. In *Barber v. Backus*, Lord Kenyon held that where there was no consideration for part of a bill, the jury might apportion and find damages for part, (also accord. *Ledger v. Ewer*, id. 216.) Except *Robinson v. Bland*, these were all *Nisi Prius* decisions. In *Phoenix Ins. Co. v. Fiquet*, the note on which suit was brought was given for a premium of insurance, and it was admitted that the plaintiffs were not entitled to as much premium as the note was given for. The difference was therefore deducted from the amount of the verdict.

Since this comment on these cases has been written, the case of *Lamerson v. Martin*, 8 Barb. S. C. R. 9, has appeared, in which the same exposition of them is substantially given by Allen, J., who delivered the opinion of the Court. See *Lamerson v. Martin*, *infra*.

² *Hibbard v. Johnson*, 19 Johns. 77; *Lattin v. Vail*, 17 Wendell, 188; *Whitney v. Lewis*, 21 id. 131; *Tallmadge v. Wallis*, 25 Wend. 116; *Batterman v. Pierce*, 3 Hill, 171; 2 Kent's Com. 472; *Lamerson v. Martin*, 8 Barb. S. C. R. 14. "Few cases," said Sharkey, Ch. J., in *Hoy v. Talliaferro*, 8 Smedes & Marsh. 739, "have been more frequently referred to, and but few have been less regarded than the case of *Frisbie v. Hoffnagle*." *Frisbie v. Hoffnagle* was, however, approvingly referred to in *James v. The Lawrenceburg Insurance Co.* 6 Blackford, 525, (though the decision itself was based upon another ground), and in *Cook v. Mix*, 11 Connect. 438, which decided that the fact of the deed to the defendant being void, by reason of

upon principle to be, that as the only covenant was that of warranty, there had been no eviction whatever, either actual or constructive, so as to give to the purchaser a right at that time to call upon the vendor to perform the covenant, and so prevent circuity of action. Hence the consideration was not touched.

In *Greenleaf v. Cook*,¹ decided in the Supreme Court of the United States, in 1817, the defence of a failure of title, to a note given for the purchase money of land, seems to have been excluded with entire propriety, as nothing in the report of the case shows that the deed contained any covenants whatever, and, from what was said in the decision as to the alleged defectiveness of the deed,² it is possible that the absence of covenants was referred to. There was a prior mortgage on the premises, under which a decree of foreclosure had been pronounced, but the possession had never been disturbed. "It has been argued," said Mr. Chief Justice Marshall, who delivered the opinion of the Court, "that there is a failure of consideration which constitutes a good de-

being made by administrators who had no power of sale, was a sufficient defence without more, (See accord. in equity, *Woods v. North*, 4 Humph. 309; cited and commented on, *infra*,) though the decision seems to have been directed principally to controverting the doctrine in *Lloyd v. Jewell*, *supra*, p. 487, that the covenants themselves were a sufficient consideration. *Tarpley v. Poage's Adm'rs.* 2 Texas, 135, was decided upon the authority of the Pennsylvania and early South Carolina decisions, which must be regarded as local in their application. See them *infra*.

¹ 2 Wheaton, 13.

² "It has also been said that the deed is defective. If it be, the defendant may require a proper deed; and it is not impossible but there may be circumstances which would induce a court of equity to enjoin the judgment until a proper deed be made. But the objection to the deed cannot be examined in this action."

fence in this action. Without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the Court is of opinion, that to make it a good defence in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something, the Court cannot say how much; nor is the inquiry a proper one in a court of law, in an action on the note. If the defendant be entitled to any relief it is not in this action."

It may be observed of this case, which, upon the facts presented, was most correctly decided, that at that time the law was far from being settled as to the right of the purchaser thus to defend himself,¹ and the true basis of the decision seems to rest not so much upon any distinction between a *total* and a *partial* failure of consideration, as on the ground that there being no covenants in the deed, the purchaser had already obtained what, from the absence of these covenants, a court of law must presume he bargained for, viz., the mere transfer of the vendor's title, such as it was, without any recourse to him in the event of its turning out defective, and hence the question of consideration was not touched—nor if the deed had contained a covenant of warranty or for quiet enjoyment, could the result have been different, for, as there had been

¹ Thus, ten years after the decision in *Greenleaf v. Cook*, it was held by the same tribunal, in *Thornton v. Wynn*, 12 Wheat. 183, that a breach of warranty of a chattel was no defence to payment of its price if the sale were absolute, and there was no subsequent agreement on the part of the vendor, to take back the article; but very recently, in the cases of *Withers v. Green*, 9 Howard, (U. S.) 213, and *Van Buren v. Digges*, 11 id. 461, this doctrine has been much modified, if not overruled.

no eviction, the purchaser would not have been entitled at that time to damages.¹

Frisbie v. Hoffnagle was followed in New York by *Lattin v. Vail*,² and substantially overruled by it. The defendant, on being sued for the purchase money

¹ In *Scudder v. Andrews et al.*, 2 McLean, 464, the facts were very similar to those presented in *Greenleaf v. Cook*, but the decision was the other way. In an action brought on a note given for the purchase money of land in Wisconsin, the defendant pleaded that the land was part of the public domain, and had never been parted with by the United States. To this there was a demurrer. There was no evidence whatever of any covenants in the deed, but this seems to have been treated by the Court of no consequence. "Nor is it perceived," said McLean, J., "in such a case, that it can be important whether the instrument given by the plaintiff to the defendant as evidence of title, was a deed of conveyance, or an agreement to convey. If the plaintiff had no title or claims to the land, which is asserted by the plea and admitted by the demurrer, the defendant has a right to set up that fact as a defence for an action on the note. Why should he be driven to his action on the warranty, if a warranty deed were given, of which, however, there is no evidence? . . . If the defendant had entered into the possession of the premises and enjoyed them, it would be clear that this defence could not be set up, for then there would only be a partial failure of consideration, which would not be a matter of defence." The demurrer was therefore overruled. In the above case, the Court, after reviewing the authorities, held that their weight inclined in favor of the position, that a partial failure of consideration could not be set up as a defence. The cases cited, however, to prove this, were by no means very modern ones, relatively to this doctrine. *Morgan v. Richardson*, 1 Campb. 40; *Solomon v. Turner*, 1 Starkie, 51; *Tye v. Gwynne*, 2 Campb. 346; *Basten v. Butter*, 7 East, 479; *Obbard v. Betham*, Mood. & Malk. 483; *Gray v. Cox*, 4 Barn. & Crèss. 108; *Laing v. Fidgeon*, 6 Taunt. 708; *Washburn v. Picot*, 3 Dev. 390; *Harlan v. Read*, Ohio, (Cond.), 578, were the cases cited, but see the later cases, cited *supra*, p. 484, note.

It may be further observed of this case, that in a court of law the presumption, from the absence of covenants, must be that the purchaser was to run the risk of the title, and, (as in the case of *Greenleaf v. Cook*), the question of consideration could not afterwards arise in an action for the purchase money. The expression, too, that it was immaterial whether the instrument was a deed of conveyance or an agreement to convey, seems to be somewhat at variance with the distinction between the respective rights of the parties while the contract is still executory, and after it is executed, which has already been somewhat fully referred to as a well settled one.

² 17 Wendell, 188.

of real estate, which had been conveyed with a general covenant against incumbrances, pleaded the existence of a prior mortgage, which he averred was a lien upon the property. On demurrer, Mr. Justice Bronson, who delivered the opinion of the Court, held that although the covenant was broken as soon as made, yet, as the defendant had not paid off the mortgage, or averred any special damage by reason of its existence, he would be at that time entitled to no more than nominal damages,¹ and hence the defence set up by the plea, could not be made available to him.

So in the subsequent case of *Whitney v. Lewis*,² in an action of debt brought on a bond³ given for the purchase money of real estate, which had been conveyed to the defendants with a covenant to warrant and defend them in its quiet and peaceable enjoyment, they pleaded that the plaintiff was not seized in fee, but that another was the real owner, and was then claiming adversely.⁴ On demurrer, however, judgment was given for the plaintiff,

¹ See *supra*, p. 129.

² 21 Wendell, 131.

³ It is hardly necessary to mention, that by statute in New York, as in some other of our States, the consideration of a bond can, under some restrictions as to pleading, be inquired into to the same extent as the consideration of a simple contract. 2 Rev. Stat. 406, § 77. At common law, such a defence was, of course, inadmissible, the obligor not being entitled to avoid a specialty, even on the ground of fraudulent representations. *Edwards v. Brown*, 1 Tyr. 196; *Wyche v. Macklin*, 2 Rand. 426; *Franchot v. Leach*, 5 Cowen, 506. The only remedy was in equity. In Pennsylvania, the equitable principles administered in that State, through the medium of common law forms, established a different rule. *Swift v. Hawkins*, 1 Dall. 17; *Stubbs v. King*, 14 S. & R. 208.

⁴ The plea also averred that the plaintiff 'knew of his want of title, and concluded, "and so the defendants say they have been defrauded." There were, however, no distinct allegations of any false representations, and the conclusion of the plea did not, as the Court held, follow from the facts alleged in it.

principally on the ground, that the plea, being in bar, did not go to the whole consideration.¹

Soon after, came the case of *Tallmadge v. Wallis*,² where in an action of debt on a bond, the defendant pleaded that it was executed in consideration of the conveyance by the plaintiff to himself of certain lots in the city of New York, by a deed, in which the former covenanted that he was lawfully seized of an absolute and indefeasible estate of inheritance in fee simple, and had good right to convey them; the plea then averred that the plaintiff was not thus seized, and had not a good right to convey, and therefore that the consideration had wholly failed. To this the plaintiff demurred.

There was also a plea of *non est factum*, upon which the issue was found for the plaintiff, and damages

¹ *Frisbie v. Hoffnagle* was in this case cited and relied on for the defendants, but its authority was rejected by Bronson, J., who, in delivering the opinion of the Court, based his decision on several grounds. In the first place, it was said that "the consideration on both sides was executed—not executory. Nothing was to be done in future. Although a right of action might afterwards accrue to both parties—to the one on the covenant for quiet enjoyment, and to the other on the bond—yet no subsequent event could make it strictly accurate to say that an executed consideration had failed; . . . and in this action on their obligation, I do not see how a breach (if it had been alleged) of the plaintiff's covenant could be a defence. It would be allowing a set-off of one action against another." It was further said, that the plea furnished no ground for saying that the consideration of the bond had failed; the plea did not go to the *whole* consideration, as it alleged that the plaintiff had not *a fee*, whereas it might be that he had a life estate or a term for years. It was not alleged that there had been an eviction from the land, or, indeed, that any thing whatever had happened since the contract was made. This made the case fall short, it was said, of *Frisbie v. Hoffnagle*, where the title had been defeated by a sale under a judgment against the vendor, though even then it was thought that that case had gone too far. The third ground of the decision was, like that taken in *Lloyd v. Jewell*, (*supra*, p. 487, note,) that the covenant was a sufficient consideration for the purchase money.

² 25 Wendell, 113.

assessed to depend upon the issue of law. The demurrer was sustained by the Court below, whose judgment was affirmed by the Supreme Court;¹ and on the case being removed to the Court of Errors, Mr. Chancellor Walworth, who delivered the opinion of the majority of that Court, held that the plea was bad upon two grounds. In the first place, if it was to be considered as going to the whole consideration, it was bad, as not averring that the grantor had no estate or interest whatever; as the consideration had not wholly failed if the defendant had acquired any estate or interest under the deed, however small; and in the second place, if intended as a plea of a partial failure of consideration it was bad, because such a defence could not be pleaded in bar, but should, under the Revised Statutes, be embodied in a notice, and given under the general issue.²

¹ The report of the case in 25 Wendell, says, "The Supreme Court, on writ of error, affirmed the judgment, and in deciding the case adverted to the opinion delivered in *Whitney v. Lewis*."

² "If there is a total want of consideration," said Mr. Chancellor Walworth, "the defendant may either plead that defence in bar of the action, or give it in evidence under a notice upon a plea denying the execution of the instrument declared on. A partial failure of consideration, however, cannot be pleaded in bar under these statutory provisions, for the presumption of a sufficient consideration can only be rebutted in the same manner and to the same extent as if the instrument declared on was not sealed. In an action upon a promissory note, or other unsealed instrument, a partial failure of consideration would not be a full defence, but could only be given in evidence in reduction of the amount to be recovered. *Burton v. Stewart*, 3 Wend. 326; *Reab v. M'Allister*, 8 id. 109. In the present case, the consideration of this bond had not wholly failed, if the defendant acquired any estate or interest whatever in the premises, or in any part thereof, or any benefit by virtue of the conveyance. The defendant, therefore, instead of pleading in bar of the action, should have pleaded the general issue of *non est factum*, and given notice with said plea of the partial failure of title, for the purpose of reducing the amount to be recovered upon the bond."

The following remarks were then made generally on the subject now under consideration:

If it be objected to this case, that the plea followed the usual form of a declaration on a covenant for seizin,

“The question whether a total failure of title, upon a conveyance with warranty, is a good defence to a suit upon the notes given for the purchase money, is one upon which judges have entertained different opinions. Where there is a covenant of warranty merely, which covenant is not broken until there has been an eviction, or something equivalent to an eviction; there appears to be great difficulty in permitting the purchaser to show a total or a partial failure of title, either in bar of the suit or to reduce the amount of the recovery. It is a well known fact that land is frequently conveyed with general warranty, which is warranty against eviction only, when both parties to the sale perfectly understand that the title is doubtful, or that there is some outstanding contingent interest, which may, perhaps, at a future period be the means of evicting the purchaser; and to protect the purchaser and enable him to recover against the vendor in case of eviction, the covenant of warranty is inserted in the deed. And yet in many cases of this kind, the purchaser continues to hold and enjoy the land until all question as to the title is removed, by lapse of time or otherwise. Now, in such cases, if the purchaser were permitted to set up an outstanding title in the original patentees or their heirs, or in some one who had received a title directly or indirectly from them, it might be very difficult, if not impossible, for the vendor to trace a perfect claim of title from the original patentee to himself, although he was in fact the legal owner of the premises at the time of the sale. Permitting the purchaser to set up such a defence before eviction, would, as a general rule, be making a new contract for the parties, which they never intended to make for themselves. But where there has been an actual eviction of the purchaser within six years after the conveyance, and by a title or claim which entitles the party recovering the property to mesne profits as against such vendee from the time of his purchase, so that the amount of damages which he would be entitled to recover upon the covenant of warranty thus broken, would be to the full extent of the purchase money of the premises, with the interest thereon, there is a virtual failure of the whole consideration of the note or bond given for the purchase money. In such a case, I can see no good reason why the defendant, to avoid circuity of action, should not be permitted to plead such total failure of consideration as an absolute bar to the suit, in the same manner as if the note or bond had been given upon the sale of a horse warranted sound, which turned out to be unsound and entirely valueless. . . . In the case now under consideration, the vendor having covenanted that he was seized of the premises absolutely in fee, if the plea had shown that at the time of the conveyance, he had no estate or interest whatever in the premises, or in any part thereof, it would have gone to the whole consideration, and in my opinion would have been a valid bar to the suit upon the bond; and the Court, in the absence of any allegation in the pleadings to that effect, would not presume that the purchaser ever

and that the breach of that covenant being admitted by the demurrer, the defendant had a right to set off the damages against the contract price, it may be answered, that in the first place it by no means follows that the damages for a breach of the covenant for seizin are necessarily measured by the consideration money. Such a result, where the purchaser has paid nothing to extinguish the paramount title, and may be still in possession, can only be where, from the evidence, the failure of title is so complete, and the loss so morally certain to happen, that a Court might feel justified in directing the jury to assess the damages by the consideration money;¹ and it seems well settled, that where the failure is partial, although the purchaser may recover damages *pro tanto*, yet he cannot make use of the action on the covenant to rescind the entire contract.² Hence such a defence is bad, if set up in a plea which is intended to be in bar of the action. In the second place, the technical rule that allows the breach of a covenant for seizin to be assigned by negating its words generally, cannot, it is apprehended, for obvious reasons,³

was in possession of land in which he had acquired no right whatever under the conveyance. But the plea is clearly defective in not showing an absolute failure of the title, as the bond was presumptive evidence of a good consideration for the whole amount of the purchase money for which it was given. The *onus*, therefore, of showing that the consideration has wholly failed, lies upon the defendant. He might probably have reduced the amount of the recovery by proving, under a notice, a partial failure of title, but having neglected to do so, he must be left to his remedy by a cross suit upon the covenants in his deed."

¹ See *supra*, p. 83.

² See *supra*, p. 87.

³ It is in general said that a plea of set-off should be as particular as a declaration in another action, and where notice of special matter is given under a general issue plea, as a substitute for a regular plea of set-off, courts are, in general, very particular in requiring that it shall be full and precise. Although, therefore, a technical rule allows a breach of a cove-

apply to cases where the breach is to be used as a defence in another action.

In the very recent case of *Lamerson v. Martin*,¹ which has appeared while these sheets were going through the press, the defendant being sued on his bond given for purchase money, proved that the premises had been, before the execution of his deed, which contained general covenants of warranty and for quiet enjoyment, sold under a foreclosure of a mortgage given by a prior grantor, though the possession still remained with the defendant. The right of the defendant to recoup as for a partial failure of consideration, or for damages for fraud, or breach of the covenants in the deed, was not, the Court observed, claimed in the answer, and was expressly disclaimed on the trial; and the defence rested upon the ground that the facts established a flat bar to the action, the case of *Frisbie v. Hoffnagle*, (which, it was contended, had never been directly overruled in New York,) being relied on in support of this position; but the Court, after looking at all the authorities in that State, was of opinion that a failure of consideration had not been shown. If *Frisbie v. Hoffnagle* had never been questioned or doubted, the Court would feel bound to follow it without question. But

nant for seizin to be assigned by merely negating its words, and with no averment of special damage, (as is required in suing on the other covenants for title) it is apprehended that it would be held, as was substantially the case in *Tallmadge v. Wallis*, that the plea should set forth particularly the breach of the covenant and the damage which had been sustained; and the more so, because such a defence is not admissible, in general, under the statutes of set-off, but is admitted either to show how much the contract price should be reduced by reason of the non-compliance with the covenant, as in *Mondel v. Steele*, 8 M. & W. 858, or, as in New York, by way of recoupment.

¹ 8 Barbour's S. C. R. 11.

it had not been regarded as good authority, or at least as unquestionable, either in their own Courts or those of other States. The defendant received the possession from his grantor, and still retained it, and until he had been evicted or compelled in some way to recognize the title of the mortgagee, he should not be permitted to draw in question the title of his grantor.

From the foregoing cases, it would seem to be settled in New York, that unless there has been an eviction, actual or constructive, of the whole subject of the contract, no defence to payment of the contract price can be set up in a plea in bar, and that such a defence, when allowed at all, under such circumstances, must be by way of recoupment, or in mitigation of damages, the circumstances themselves being contained in a notice of special matter and given under a general issue plea. What will be sufficient to entitle the defendant thus to recoup his damages, will of course depend upon various circumstances. Where the only covenants are for quiet enjoyment or of warranty, nothing short of an eviction, actual or constructive, will enable him to do so.¹ If the eviction is from a specific part of the subject of the purchase, it is apprehended that the damages *pro tanto* can be successfully set off or recouped against the contract price. And where the eviction is a constructive one, and the paramount title has been purchased by the defendant, the same rules which are enforced as to limiting a plaintiff's recovery to the amount thus paid by him,² will, it is conceived, be equally applied where the position of the purchaser is that of a defendant.

¹ Lamerson v. Martin, 8 Barb. S. C. R. 11.

² See *supra*, pp. 131, 242, 249, 252.

The general principle established by this class of cases in New York, that the mere absence of title will not, of itself, constitute a valid defence to the payment of securities given for the purchase money, has been very generally recognized throughout the Union. Thus where¹ the defendant offered to prove that the premises which had been conveyed to him with covenants for seizin and of warranty, were levied upon under judgments previously obtained against his grantor, it was held by the Supreme Court of Maine, that the evidence was rightly excluded.² So, where in the same State³ the land which had been conveyed with "the usual covenants of warranty" was subject to a mortgage, which the mortgagee had announced by advertisement his intention of foreclosing, it was held that these facts did not constitute a defence to payment of the purchase money, as it did not appear that

¹ *Wentworth v. Goodwin*, 21 Maine, 150.

² "The attachment and subsequent levies on the land conveyed," said Shepley, J., who delivered the opinion of the Court, "were incumbrances upon the title which was conveyed to the grantee, subject to them. The grantee had acquired the legal right to pay off these incumbrances, and, by so doing, his title would have become perfect. If the effect may have been, that through neglect to redeem, the title of the grantee has been destroyed, that is a result which may often happen from a like cause, when the title is more or less incumbered at the time of conveyance. It did not appear from the testimony proposed to be introduced, whether the lands were, or were not, appraised at their full value. A legal presumption does not arise, that the appraisal was for the full value, for the statute contemplates a still subsisting value in the right to redeem, which may be the subject of attachment and sale. Nor did the proposed testimony show, whether the grantee had, or had not, received the rents and profits of the land from the time of conveyance to the periods of levy. And if any were received, he was entitled to retain them; for no other person could call upon him to account for them. The burden of proof was upon him. The ruling of the presiding Judge was therefore correct; 'That the facts aforesaid, offered to be proved by the defendant, were insufficient to show a total failure of the consideration of said note.'"

³ *Jenness v. Parker*, 24 Maine, 289.

any actual entry had ever been made by the mortgagee, or the defendant been dispossessed of the premises.¹ So, where the defendant pleaded an outstanding right of dower, it was held that unless he had extinguished this right, he could not avail himself of it as a defence, and, even if he had, it would only be a defence *pro tanto*.²

¹ The case seems not to have been decided so much upon this ground, as on the ground that the failure of consideration was not total, there being no evidence that the defendant had not received the rents and profits of the land. "If any thing valuable does pass to the grantee," said the Court, "short of an absolute interest, in conformity to the terms of the deed, it becomes a case of unliquidated damages, the remedy for which should be sought by an action of covenant broken." This strictness, however, is not in accordance with the more modern decisions, and in a subsequent case (*Herbert v. Ford*, 29 Maine) where the consideration of a note was the transfer of the practice and good-will of a physician, the Supreme Court of Maine held, that the plaintiff was responsible in damages, if there had been a breach of his contract, but it did not appear from the current of authorities, that the defendant was to be limited to that remedy alone, and it was said that the tendency of decisions had been to allow a broader latitude of defence than was permitted by the common law to bills of exchange and promissory notes, where the justice of the case required it, and a circuitry of action could be avoided.

² *Whistler v. Hicks*, 5 Blackf., 100; *Smith v. Ackerman*, id. See *Buell v. Tate*, 7 id. 55. In *James v. The Lawrensbury Insurance Co.*, 6 Blackf., 525, the case of *Frisbie v. Hoffnagle*, was, however, cited and approved, though the decision itself was based upon different grounds.

In *Chase v. Weston*, 12 New Hamp., 415, the defendant after the execution of the deed to him, which contained "the usual covenants of warranty," mortgaged it "with the usual covenants" to one who foreclosed the mortgage, and then paid off a prior mortgage which had been executed by the vendor before his conveyance to the defendant. The Court seemed to think it very doubtful whether under the authorities (*Lloyd v. Jewell*, 1 Greenl., 352; *Howard v. Witham*, 2 id. 390, which case, however, is not in point, *Knapp v. Lee*, 3 Pick., 452; 4 Kent's Com., 472,) even a total failure of consideration could be admitted as a defence, but decided the case on the ground, that as the defendant had assigned the land to another, he must also be deemed to have parted with his right to the benefit of the covenants, which he would be precluded from suing on until he had satisfied the damages recovered against him by his vendee. See *supra*, p. 304. But in *Chaplain v. Briscoe*, 11 Smedes & Marsh 372, the deed to the defendant, after reciting that there was a small part of the premises to which the vendor had not a complete or sufficient title, provided, that if the latter were unable to show a

Hoy v. Taliaferro,¹ decided by the Supreme Court of Mississippi, in 1847, was a strong case as to enforcing the rights of the vendor. The defendants, who had purchased land with covenants of general warranty, proved a judgment recovered against their vendor in the Federal Court shortly before the execution of the deed, and a levy and sale under it by the marshal of the district about ten years after, when the property was purchased by a stranger, and the defendants then voluntarily abandoned the possession. It was, however, held that these facts did not constitute a defence to the payment of a note given for the contract price. The covenants of warranty had not, it was said, been broken. There had been no eviction. It had been insisted that the title was divested by the marshal's sale as completely as it could have been by eviction, but the Court had not been furnished with any authority to show that a sale either by a marshal or sheriff was equivalent to eviction. Manifestly, it was not so, since the original vendor might still protect his vendee by purchasing from the marshal's vendee, or it might happen that the title acquired from the marshal would not be sufficient to effect an eviction. The voluntary abandonment in this instance gave, it was said, no

complete title to the whole of the premises at the maturity of the latest note given for the purchase money, he would remit so much per acre for such portion to which he could show no title. Soon after, the defendant sold the land, without covenants, to a third party, and being sued on the last of the notes, the above facts were given in evidence, and also that there was a paramount owner in possession of part of the premises. The plaintiff argued, that the defendant had assigned, with the premises, all his right under the covenants, but the Court held, that the assignment to the third party was not a waiver of the right reserved to the defendant. It was not a thing that could pass to a purchaser, and the defendant's right stood precisely as it did before his assignment.

¹ 8 Smedes & Marshall, 727.

strength whatever to the defence. A court of law, though the proper tribunal for the trial of titles to land, would not try such titles collaterally. The proceedings must be direct, otherwise the title cannot be questioned. Where there had been an eviction, the defence of failure of consideration might be let in, because the superiority of the outstanding title would then be established by a judicial determination. The inquiry would then be narrowed down to a single matter of fact, susceptible of being proved by record evidence.¹

In the subsequent case of *Duncan v. Lane*,² the defence relied on was that the vendor's title being derived under a sale made by himself as administrator, was invalid, while in *Heath v. Newman*,³ the premises had been sold under a judgment against the vendor, but

¹ "There was not," said Sharkey, Ch. J., "a total failure for another reason; the defendants held possession under their deed for nearly or perhaps quite two years before the marshal's sale. They were not accountable for the rents and profits during that time to any one. This brings the case completely within the reasoning of the Chancellor, in *Tallmadge v. Wallis*, (25 Wend. 157; *supra*, 499.) On this ground, too, it falls within the decision in *Greenleaf v. Cook*, (2 Wheat. 13, *supra*, p. 495,) where it was said the failure was not total, because the equity of redemption might be worth something. The possession of the land for two years must have been worth something. This fact, however, in the present case is not very material when the case is considered under the general warranty; the absence of an eviction is conclusive upon the defendants." It is, however, apprehended that the receipt of the rents and profits and the absence of accountability for them to the paramount owner, would not have defeated the right of the covenantees to recover by suing upon their covenants, but would merely have prevented the recovery of interest on the consideration money. See *supra*, p. 91. It was further said, as in *Duncan v. Lane*, 8 S. & M. 753, that the defendants could not avail themselves of the statutory covenants implied by the words "grant, bargain and sell," as the express covenant of warranty did away the effect of all implied covenants. This, however, which is correct law as to the covenants arising from the words of leasing, never was applied, at common law, to the case of a freehold. See *supra*, p. 355.

² 8 Sm. & Marsh. 744.

³ 11 Sm. & Marsh. 201.

the defendant was still in possession. In both these cases, the covenants being of general warranty, the Court held that there having been no eviction the defence could not be set up.

Dennis v. Heath,¹ was somewhat similar in its circumstances to *Hoy v. Taliaferro*. The land, which had been conveyed to the defendant with "full covenants of warranty," was levied upon and sold under a judgment obtained against the plaintiff, its vendor, and was purchased by one who, having previously been the tenant of the vendor, had, since the sale by him, attorned to the father of the vendee, supposed by him to be the purchaser, and after the purchase at the sheriff's sale, held the land as his own. The Court before whom the case was tried instructed the jury that these facts constituted an eviction so as to entitle the defendant to a verdict in a suit brought on a note given for the purchase money; but the Supreme Court reversed the judgment, holding that there had been no eviction. "There has been no action of ejectment, no judgment, no turning out of possession, nothing but a voluntary surrender of possession and yielding of the right without an effort to maintain it. . . . If at the time of the sale there be a paramount title and an adverse possession under it, the holding out of the purchaser is equivalent to eviction. But this case is not within this principle. The record shows that the plaintiff sold to the defendant and put him in possession under a deed with covenants of general warranty, and that the defendant voluntarily surrendered to another, likewise claiming title under the vendor by a subsequent purchase under a prior incumbrance.

¹ 11 Sm. & Marsh. 206.

To hold that this satisfied the requirements of the law would in this and in many other instances, cause the trial of titles to land in an action of debt on assumpsit. We are not disposed thus to change the established rules of law."¹

It may be observed of this case, and of *Hoy v. Taliaferro*, that although the decisions in both were correct, still the objection to trying the title to land in an action for its contract price, must equally apply in every case where the paramount title had not been established by a judgment of a court of record. Yet to give to such a judgment a conclusive effect would be, where the vendor had not been vouched or notified, contrary to well established principle,² and it is apprehended that in every such case the purchaser would be bound to make out the adverse title under which he had been evicted, or to which he had yielded, with as much particularity as if suing on the covenants; and there seems no greater objection to the question of title being brought before the Court in the one form of action rather than the other.

In an early case in Alabama,³ the Supreme Court,

¹ In *Dennis v. Heath*, the note sued on was one of four, each for \$1500. The whole subject of the purchase seems to have been levied upon, and was sold for \$325 to one Perkins, who was connected by marriage with the defendant. It might be extremely doubtful whether in suing upon the covenant of warranty the vendee could have recovered the whole amount of his consideration money, as it is well settled that although a purchaser may have had his vendor's title wholly defeated, and may be out of possession, yet where it is in his power to regain it by the payment of a certain sum, that amount and no more is allowed him. *Supra*, p. 137. There was no direct proof of fraud or connivance in *Dennis v. Heath*, but the plaintiff's counsel urged that these circumstances savored strongly of it, and the Court in delivering their opinion alluded to the price and the connection of the parties.

² See *supra*, p. 199.

³ *Peden v. Moore*, 1 Stewart & Porter, 81.

while approving the course of decision which suffered a partial failure of consideration of personal property, to be given in evidence as a defence to the contract price, intimated a doubt whether the same principle could be applied to the sale of real estate so long as the contract remained unrescinded. In a subsequent case,¹ where the premises, which were the subject of the contract, had been sold under a judgment against a prior vendor,² but the defendant still remained in possession, it was held that evidence of these facts was properly rejected. "If a failure of consideration arise from the conveyance of a land title, which is defective by reason of a paramount title in another, or other incumbrance, the invalidity of the title must be ascertained by an eviction, or something tantamount thereto, before the relief can be sought." So in a later case,³ where the circumstances were similar, such a defence was refused on the ground that the damages, if any, being unliquidated, could not come within the statute of set-off,⁴ and that the failure of consideration was but partial.⁵

¹ *Wilson v. Jordan*, 3 Stewart & Porter, 92.

² The Court said, they took it for granted that this incumbrance was covered by the covenants for title which the vendor had given, as otherwise the defence would of course be wholly inadmissible on familiar principles. The case of *Frisbie v. Hoffnagle* was commented upon in the decision in this case, and the authorities in Pennsylvania and South Carolina also referred to. See them, *infra*.

³ *Dunn v. White*, 1 Ala., 645.

⁴ The Alabama statutes of set-off, it was said, were copied exactly from the statutes of Geo. II.

⁵ The Court went as far so to say, that it did not think that, on principle, the right to reduce the amount agreed to be given for the purchase of land by proof of a partial or total failure of the consideration, could be sustained when the contract had been executed by deed with warranty. "Not only is there a security of a higher nature, the covenant against incumbrances, but it would involve the jury in the investigation of matters either foreign to the question before them, or not proper for this investigation. Thus, if the defendant

These decisions were followed by the case of *Cullum v. The Branch Bank at Mobile*,¹ which seems to have gone to a greater length in restricting the rights of a purchaser than any other modern decision. In an action on a promissory note for a large sum, the defendant proved that it was one of several given for the purchase money of a lot in Mobile, conveyed with a general covenant of warranty; that after the sale the defendant discovered a mortgage executed by the vendor a short time previously; that the latter "had concealed the existence of the mortgage, (though it was on record) and did not disclose its existence to the defendant when he purchased the lot," and that when the latter discovered it, he offered to cancel the deed and notes; that soon after, the vendor became insolvent and absconded, having first transferred the note in suit, with the other's to the Bank, as collateral security for antecedent debts; that the lot was a vacant one, the defendant never having taken possession of it; that the mortgagee "took the control of it, enclosed it, paid the taxes and made the pavement in front of it;" that the mortgage was then assigned to the Bank, who obtained a decree of foreclosure under which the lot was sold for less than the mortgage debt—purchased by the Bank—and held by it at the time of

seeks to reduce the amount of a note given for the purchase of land, either in whole or in part, by proving that he had paid off an outstanding incumbrance, it would certainly be open for the plaintiff to show that he was not bound to discharge the incumbrance, from some illegality of consideration, or that he had himself discharged it—such an inquiry might involve an examination of intricate accounts between the plaintiff and the incumbrancer, such as a court of equity could alone with propriety adjust."

¹ 4 Alabama, 21.

their bringing suit on the note.¹ The Court in delivering their opinion, did not consider it important to ascertain the period when the purchaser abandoned the lot to the mortgagee, or whether he was authorized so to do without suit, because it considered the sale and possession under the decree of foreclosure as equivalent to a legal eviction, and the only question therefore was whether the defence could be sustained without overstepping the boundary which divided the jurisdiction between law and equity, and that it was immaterial whether the defence went to the whole consideration or only a part, and the broad proposition was laid down, that neither on the ground of fraud nor of eviction, could a purchaser defend himself at law from payment of the purchase money.²

¹ It may here be observed, that the note being held by the bank merely as collateral security for a pre-existing debt, was held to be subject, in their hands, to all the defences which could have been made to it by the original payee.

² It is but due to the court to state the reasons on which their decision was based. "Without now stopping to inquire," said Goldthwaite, J., who delivered the opinion of the court, "whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defence, even in the case where the recovery on the covenant of warranty ought to be equal, or larger, than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on a covenant of warranty are, in their nature, unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White and McCurdy*, 1 Al. 645. Secondly, the covenant of warranty would not be extinguished by this defence. Thirdly, the covenant itself operates as an estoppel to the grantor, and would have the effect to transfer to the purchaser or his assigns, any subsequently acquired title, which should be vested in the grantor. Fourthly, by the conveyance, all covenants running with the land are, *ipso facto*, assigned to the purchaser. This last reason, it is apparent, does not apply to this case, because the breach of the covenant is a consequence of the vendor's own act, but it must so frequently apply to cases, that it is decisive against the adoption of a practice which would be more like an exception than a general rule. There are many distinctions between the rules which affect real and personal estates, which are distinctive features of the common law, and their ramifi-

The authority of this case has been repeatedly and recently affirmed in that State; and it is there said

cations extend so far that no one can clearly foresee the consequences of overturning them. Among these not the least important are the different modes of succession after the death of the last possessor, and the different effect of covenants respecting each species of estate. If the defence of fraud was permitted in this case, to avoid a recovery at law, there is nothing in the record to show that the contract has ever been rescinded, and therefore the vendor hereafter might be liable to an action on his warranty; or in the case of a title subsequently acquired by him, be estopped by his covenant from asserting it. Many other difficulties may be supposed which do not indeed apply to this particular case, as it is presented on the record, but which are conclusive against the admission of this defence as a general rule. Take for instance, the case of an eviction after the receipt of large rents or profits, for which the purchaser is not responsible to the evictor: are these to remain unaccounted for, or must not the defence be denied under the inference of our previous judgment in *Dunn v. White and McCurdy*.

“Again, a case may be stated which seems to furnish an absolute test of the unsoundness of this defence at law. In the event of the death of the purchaser before eviction, and previous to payment of the purchase money, the estate would descend to the heir, whilst the personal representative would be answerable for the debt. Which is entitled, the personal representative to defeat the action against him on the notes, or the heir to his action on the covenant of warranty?

“This examination of principles and authorities leads us to the conclusion that the defendant has no available defence at law; but it is asked, whether it can be supposed that he is remediless, in a case where injury is so apparent? We answer that no such consequence flows from the assertion of these rules. Assuming that the warranty was entered into in the most perfect good faith, we think relief must be given in Chancery, on the ground of the vendor's insolvency. . . . When the defendant accepted of the covenant of warranty, it was doubtless considered as an effective security, and if he had been evicted before the payment of the purchase-money, our impressions tend strongly to the propriety of not permitting the vendor himself, if insolvent, to receive that portion of the purchase money which he would be compelled to refund in an action on the warranty, though we are aware of decisions to the contrary; but however this may be, his insolvency furnishes a ground of equitable relief, entirely within the influence of the case of *Pharr and Beck v. Reynolds*, 3 Ala. 529. It is useless to pursue an insolvent indorsement, but it is quite too injurious to be allowed to pay him money which he will never refund.” In the case of *Pharr v. Reynolds* referred to in this opinion, the Court held, that although equity would not, after judgment on a plea in abatement, grant relief in the nature of a new trial, yet that where the bill also prayed for an account and set forth the insolvency and absence from the State, of the opposite party, the

to be settled, that if a purchaser accept a deed with warranty he cannot at law, set up either fraud or failure of consideration as a defence to the contract price.¹

The cases, therefore, of *Frisbie v. Hoffnagle*, and *Cullum v. The Branch Bank*, may justly be considered as standing at the opposite extremes of this branch of law, and the great current of authority seems to flow between the doctrines advanced by these cases.

But while on the one hand, courts of law seem unwilling to recognize the right of the purchaser to detain the purchase money, unless there has been an eviction of the subject of his purchase, or something equivalent to it; on the other, they do not hesitate to allow such defences in case such an eviction has taken place.

Thus, in Massachusetts, in the case of *Knapp v. Lee*,² the defendant on being sued on one of several notes given for the purchase money of land which had been conveyed "with the usual covenants of seizin and warranty," proved that his vendor's title had been defeated by a judgment recovered against him, under which, shortly before the trial, the defendant had been evicted, and the Court without determining the general question whether, when other sufficient remedies existed, a mere failure of title, when there were covenants of seizin and war-

Court would enjoin proceedings on the judgment, letting it stand however as a security while the account was being taken by the master.

¹ *Stark v. Hill*, 6 Ala. 785; *Knight v. Turner*, 11 id. 639; *Patton v. England*, 15 id. 71. The principles upon which courts of equity administer relief in that State, seem to be the same as elsewhere. See *Andrews v. McCoy*, 8 Alab. 920.

² 3 Pick. 459.

ranty, would constitute a defence against an action for the consideration, held that in the present case it was consistent with every sound principle to allow the defence which was offered. The plaintiff might meet it by showing that the title was good, or that the land at the time of the eviction was worth less than the consideration, and thereby entitle himself to recover the difference, but without evidence to this effect, he ought to be entirely barred of his action.¹

So, in the later case of *Rice v. Goddard*,² where the defendant had been evicted under a title paramount to that of the plaintiff, it was held that the failure of title was total, and the former was entitled to a verdict.³

So it is apprehended, that in cases where the purchaser had been obliged to buy in the outstanding title, courts would not hesitate to sanction his right to deduct from the purchase money the amount ne-

¹ The decision in this case seems to have been to some extent based upon the insolvency of the party liable on the covenants.

² 14 Pick. 293.

³ In these cases the argument for the plaintiff was chiefly based upon the assumption that the covenants themselves were a sufficient consideration for the payment of the purchase money, but this the Court repudiated, and denied the authority of *Lloyd v. Jewell*, 1 Greenl. 353, which had been decided on that ground, see *supra* p. 487. *Dickenson v. Hall*, 14 Pick. 217, was a case of a sale of personal property. In *Trask v. Vinson*, 20 Pick. 210, (which however was a case of an executory contract,) it was said that the cases of *Dickenson v. Hall*, and *Rice v. Goddard*, held that where the consideration of a note was the conveyance of property, real or personal, and the title failed so that nothing passed by the conveyance, the note was *nudum pactum*. "Those cases were well considered, and are founded on sound principles and supported by an irresistible current of authorities. With the exception of a few *obiter dicta* in our own reports, and the case of *Lloyd v. Jewell*, in Maine, scarcely a dictum to the contrary can be found; while there is a remarkable coincidence in all the other American and English decisions upon the subject."

cessarily and *bona fide* paid for that purpose,¹ provided his covenants were such that these circumstances would entitle him to damages upon them.

Thus in a late case,² the defendant being sued on a note for \$113, purchase money of land conveyed with general warranty, proved that the plaintiff had previously conveyed the land to another, who was about to sue upon his claim when the defendant purchased it for \$450, and the Court had no doubt that these facts constituted a substantial defence to the action.³

¹ Thus it is observed in the most recent English treatise on the law of vendors: "After the conveyance has been executed, the purchaser may discharge out of any purchase money which remains unpaid (although secured) any incumbrances, which either have been created by the vendor himself, or are covered by his covenants for title, but not incumbrances paramount to his title and not covered by his covenants." Dart on Vendors, 381.

² Pence v. Huston's Exrs. 6 Grattan, 305.

³ It seemed to be doubted in this case whether the plea filed came within the statute of 16th April, 1831, authorizing a defendant to file a special plea in bar, setting forth any such failure of consideration as would entitle him to damages at law, or relief in equity; but the Court held, that if the plaintiff sought to take advantage of the insufficiency of the plea, he should have demurred to it, instead of taking issue.

It may save the student some waste of time to observe that many cases are cited in the reports and occasional notes in text books as bearing upon the subject of this chapter, which in fact have no connection with it. Thus *Stone v. Fowle*, 22 Pick. 166; *Tillotson v. Grapes*, 4 New Hamp. 448; *Chandler v. Marsh*, 3 Verm. 162; *Long v. Allen*, 2 Florida, 404; *Pequa v. Morly*, 7 Smedes and Marshall, 340; *Siddell v. Sims*, 9 id. 596; *Feemster v. May*, 13 id. —; *Higgins v. McGimpsey*, id. 532; *Leonard v. Bates*, 1 Black. 185; *McCay v. Carrington*, 1 M'Lean, 50, were all cases of executory contracts, and of course governed by different principles from cases of contracts executed. *Burton v. Schermerhon*, 21 Verm. 291, was a case of personal property, and it was held, affirming the doctrine in *Stone v. Peakes*, 16 id. 218, that a partial failure of consideration was no defence unless the defendant offered to rescind the contract. *Lawrence v. Stonington Bank*, 6 Conn. 525, merely decides that between the original parties to a negotiable note, its consideration may be inquired into, while *Homes v. Smith*, 16 Maine, 177, holds the equally familiar proposition, that if the note is in the hands of a

We now approach the examination of the cases in which a purchaser has sought the interposition of equity to rescind the contract or enjoin the collection of the purchase money.

It has been before observed, that although the machinery of a court of equity seems better adapted to the regulation of the respective rights of the parties in such cases as are likely to arise in this connection, yet that unless the purchaser has a present right to damages upon his covenants, no grounds exist, as a general rule, on which to found an equitable jurisdiction. Where such a right exists, the jurisdiction rests on familiar principles. Where it does not, although exceptional cases may occur where all the parties to the title are before the Court, and their respective rights, therefore, capable of equitable adjustment,¹ yet, as a general rule, the *quia timet* jurisdiction seems to be one but rarely exercised.

The cases of *Bumpus v. Platner*, and *Abbott v. Allen*, are generally referred to as leading authorities on the subject of equitable relief from payment of the purchase money, in the absence of fraud. In the first of these cases, decided in New York in the year 1814,² where the bill prayed an injunction to restrain proceedings on a mortgage given for the purchase money, on the ground that the title had been previously conveyed to another, all of whose estate had become forfeited to the Commonwealth, the Chan-

bona fide indorsee before maturity, and taken in the usual course of business, its original consideration cannot be inquired into.

The student must be careful to class by themselves the cases in Pennsylvania, and the earlier authorities in South Carolina, which will be presently referred to.

¹ See these cases referred to, *infra*, p. 538.

² 1 Johnson's Ch. R. 213.

cellor, while he admitted that it was difficult to extract from the books what was the rule of equity on this point of failure of consideration, still apprehended that it might be safely said that there was no case for relief where possession had passed, and continued without any interruption under a paramount title. He considered an eviction at law an indispensable part of the plaintiff's claim to relief. The defendant conveyed to the plaintiffs with covenants of warranty, and he was bound to defend their title, and *non constat*, that he was not able to do it. If the title failed, the plaintiffs could resort to the covenants in their deed for their indemnity. Hence it was said to be without precedent, and dangerous in principle, to arrest the collection of the purchase money on the mere allegation of a failure of title without more.

In *Abbott v. Allen*,¹ which was substantially similar in its features to the case just cited, a doubt having been cast in the argument over the correctness of these principles, the Chancellor reviewed his decision and was satisfied of its soundness. "It would," said he, "lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which

¹ 2 Johns. Ch. R. 521—decided in 1817.

he never asserted, and perhaps never thought of? The only plausible argument for the injunction is, that as the plaintiff has covenants to secure his title, the interference of this court is necessary to prevent circuity of action, and that the plaintiff ought not to be compelled to pay the purchase money, when, by a suit on his covenants, he might, almost concurrently, be enabled to recover it back again. This argument would apply to every case of mutual and independent covenants, and would prove too much; but the proper answer here is, that to sustain the injunction would be assuming the fact of a failure of title before eviction, or trial at law; and which this court, as not possessing any direct jurisdiction over legal titles, is not bound or authorized to assume. This court may, perhaps, try title to land when it arises incidentally; but it is understood not to be within its province, when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference." The question that might be presented, if there had been a previous eviction, or an existing incumbrance which appeared to admit of no dispute, was here left undecided. It would be hazardous, it was said, to define the limits of equitable relief in supposable cases of the like kind.¹

¹ It may, however, be observed, that when a question of title is presented, the determination of which is incidental and necessary to the relief prayed, equity will not deny that relief merely because the question of title is involved. Such questions must be necessarily determined in nearly every case of specific performance, and come clearly within the concurrent jurisdiction of equity. It is; moreover, impossible, in practice, for a court to refuse to examine the adverse title in cases where the purchaser has a present right to actual damages, and the relief is based solely upon the ground of preventing circuity of action. For in such cases it must determine that

Within a few weeks, however, of this decision, the case of *Johnson v. Gere*,¹ was presented before the same Court, upon an *ex parte* application for an injunction to restrain proceedings on a mortgage, given for the purchase money of land, which had been conveyed with covenants for title, on the ground of an ejectment having been brought to recover the possession. The bill prayed for an injunction until answer and the further order of the Court. "The Chancellor granted the injunction, and distinguished this case from those wherein there was only an allegation of an outstanding title, and no disturbance, prosecution, or eviction thereon. Here the party was actually prosecuted by an action of ejectment, on the ground that the title derived from the defendant was defective. The defendant is entitled, and it will be his duty to defend the ejectment suit, and until that suit is disposed of, he ought not to recover the remaining moneys due on the bond."

It is believed that this decision is not now generally regarded as a precedent. Although in occasional cases in New York, there have been intimations that equity will not relieve unless there has been an eviction, "or a suit actually commenced to recover the land;"² yet in none of these cases did that circumstance occur,³ and a course of decision in that

the right to damages exists, and it by no means universally happens that it is relieved as to this by a previous judgment of a common law court.

¹ 2 Johns. Ch.

² *Legget v. McCarthy*, 3 Edw. Ch. 126; *Edwards v. Bodine*, 26 Wend. 114.

³ It is also worthy of remark, that Mr. Chancellor Kent, who had himself granted the injunction in *Johnson v. Gere*, takes no notice of the case in his Commentaries, (2 Com. 472,) while he quotes with approbation the case of *Abbott v. Allen*, and those which have followed it. The authority of *Johnson v. Gere*, was denied in the recent case of *Platt v. Gilchrist*, 8 New York Legal Observer, 7, and in *Miller v. Avery*, 2 Barb. Ch. 594, where Mr. Chancellor

State, has not only repudiated the doctrine of *Johnson v. Gere*, but has restrained the application of the

Walworth held the following language: "I think it evident that the reporter was under a mistake in the statement of the case, or that the Chancellor overlooked the fact that it was not alleged in the bill that the complainants ever believed their title to the land was defective. For it cannot be possible that he intended to decide that a mere claim of a paramount title by a third person, and the bringing of a suit upon that claim against the purchaser, was sufficient to authorize the Court to stay the vendor, who had warranted the title from, proceeding at law or in equity to collect the unpaid purchase money. If the law was so, any vendee who was not ready to pay his purchase money when it became due, might make a secret arrangement with some third person to claim the premises and bring an ejectment suit therefor, and thus tie up the vendor from collecting his debt indefinitely. For, if the vendor should be allowed by the court at law to interfere with the defence of the ejectment suit so as to get it out of court in a reasonable time, the plaintiff might submit to a nonsuit and then bring a new action. And such new action, either by the original plaintiff or by a new claimant, would entitle the vendee to a new decree, staying the collection of the purchase money until the final termination of that suit."

The authority of *Johnson v. Gere*, has, however, been supported by a few cases. Where in New Jersey, (*Shannon v. Marselis*, Saxton, 413,) all the parties to the title were before the Court, and there could therefore be with propriety an equitable settlement of mutual claims, the case did not need the authority of *Johnson v. Gere*, which was cited with approbation, nor the expression, "Where then is a mere allegation upon an outstanding title or incumbrance, the Court will not interfere, but leave the party to his remedy on the covenant, but where there is an eviction or even an ejectment brought, it will interpose."

But in *Van Riper v. Williams*, 1 Green's Ch. 407, to a bill for a foreclosure of a mortgage, the defendant answered that it was given for the purchase money of land conveyed with covenants for seizin and against incumbrances, excepting a specified mortgage, but that the premises were subject to another mortgage, "still outstanding unsatisfied and uncanceled." The case being submitted on the pleadings and proofs, the Chancellor held that the mortgage must be first removed before a decree for foreclosure and sale in equity could be made, or so much of the proceeds of sale as might be necessary for that purpose must, by the decree, be directed to be applied to payment of the incumbrance, and the amount thus applied deducted from the mortgage debt. In *Van Waggoner v. M'Ewen*, 1 Green's Ch. 412, a defence to a bill for foreclosure of a mortgage was denied, because the defendant made a mere allegation of an outstanding title, but the Court expressly declared, on the authority of *Johnson v. Gere*, and *Shannon v. Marselis*, that if a suit were pending to try the title, or the defendant had been dispossessed, there would be propriety in resisting the foreclosure,

quia timet jurisdiction of equity in this connection, within such narrow limits as almost to amount to its

and in the recent case of *Jaques v. Esler*, 3 Green's Ch. 462, this rule was applied, and an injunction was held to have been properly granted for the purpose of restraining proceedings by an assignee of a bond given for purchase money of land, on the ground that an ejectment had been brought by persons claiming a paramount title, who had also filed a bill to set aside the conveyance to the complainant. "For it is well settled, that the purchaser of real estate by deed of warranty, has a right to relief in equity against the vendor, who seeks to enforce the payment of a bond and mortgage given for the purchase money, until a suit actually brought to recover the premises by a person claiming the paramount title shall have been determined. He is not obliged to look merely to the covenants in the deed; he is not to be driven to such circuitry of action, nor to rely upon that as his only security. The fund in his hands is a security, of which it would be inequitable to deprive him." The injunction was dissolved upon another ground, viz.: that upon the assignment of the bond, which was after these suits had been brought, the complainant had stated that he had no defence whatever to make to its payment, and the Court held that he had thus waived an equity to which he would otherwise have been entitled. See as to this point, *Morrison v. Beckwith*, 4 Monr. 73. In *Puckett et al. v. McDonald et al.*, 5 Howard, (Miss.) 269, the purchasers filed a bill to enjoin a judgment obtained by administrators for the purchase money of lots sold by them with covenant of general warranty, and of which the purchasers were in possession, on the ground that the requisitions of the law as to giving the proper notice, &c., had not been complied with by the administrators, and the Court, while freely admitting the doctrine that when the vendor is let into possession under a deed with full covenants, and there has been no eviction nor any fraud, he cannot resist the payment of the purchase money on the ground of a defect of title, but must be driven to his covenants, yet held, that in the present case, the sale was virtually made by the Court, and the administrators acted only as commissioners to execute the order of sale, and that their covenants could not furnish a foundation upon which an action could be maintained against them personally, (but see *supra*, p. 421,) nor could the vendee be supposed to place any reliance upon such assurance. In *Woods v. North*, 6 Humphries, 309, the circumstances were similar, and the decision the same way, though it was put upon the ground that a covenant for seizin which the administrator had given, was such a *representation* by him as amounted to fraud, and the contract was rescinded on the ground of misrepresentation. The student will be careful not to rely too strongly upon either of these cases in practice.

In Virginia a practice was introduced at an early period for the purpose of enabling a mortgagee to obtain the money lent without the delay and expense attending a bill of foreclosure. The lands were conveyed by way of

virtual denial.¹ Thus, in one of the most recent cases,² on a bill to foreclose a mortgage given for purchase money of land conveyed with warranty, the answer alleged that a suit had been brought in the Supreme Court in Equity, by persons claiming

mortgage to a third person, agreed on by the mortgagor and mortgagee, in trust, upon non-payment of the money at the appointed time, to sell, mortgage, or lease the premises. (See 1 Lomax's Dig., 324.) Under such deeds of trust, courts of equity in that State were very liberal as to enjoining sales where the defect of title, covered by the defendant's covenants, could be shown to exist. In *Gay v. Hancock*, 1 Randolph, 72, where the purchaser proved an outstanding claim embraced within his covenants, and a suit then actually pending under it, the Court of Appeals held, that the sale should be enjoined until the cloud resting on the title, in consequence of the claim, should be removed. This decision was approved and followed in subsequent cases; *Ralston v. Miller*, 3 Rand., 49; *Miller v. Argyle's executors*, 5 Leigh, 467; *Koger v. Kane's administrators*, id., 606; *Long v. Israel*, 9 id., 569, and it was admitted that the court had, in favor of purchasers, gone far beyond any thing which had been sanctioned by the courts of Chancery in England, or elsewhere, in enjoining the payment of the purchase money after the purchaser had taken possession under a conveyance, especially with general warranty; but it was said that it had never gone so far as to interfere, unless the title were questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective. *Ralston v. Miller*. In *Miller v. Argyle*, it was said that a distinction had always been strongly drawn between an injunction in the case of a deed of trust, and in the case of a judgment at law, "for it never can be equitable to permit a sacrifice by sale under a doubtful title, though it may be but just that the vendor should be suffered to enforce a judgment for his purchase money, when the vendee is in possession, since the doubt about the title, may eventually turn out to be frivolous and groundless." This distinction, however, seems not to have been clearly observed, and the practice sanctioned with respect to deeds of trust, seems to have insinuated itself into all securities given for purchase money. See *Yancey v. Lewis*, 4 Hen. & Munf., 390; *Long v. Israel*, 9 Leigh, 569. *Grantland v. Wight*, 5 Munf., 295, was an executory contract.

¹ *Bates v. Delavan*, 5 Paige, 350; *Hoag v. Rathburn*, 1 Clark's Ch., 12; *Denston v. Morris*, 2 Edward's Ch., 37; *Legget v. McCarthy*, 3 id., 124; *Withers v. Morrel*, id., 560; *Edwards v. Bodine*, 26 Wendell, 109; *Woodruff v. Bunce*, 9 Paige, 443; *Banks v. Walker*, 2 Sandford's Ch., 344; *Miller v. Avery*, 2 Barb., Ch. 594. See *Tone v. Brace*, 1 Clark's Ch., 291; *S. C.*, id., 509; 8 Paige, 597; 11 id., 569. See, also, *passim*, *Chesterman v. Gardiner*, 5 Johns. Ch., 29; *Gouverneur v. Elmendorf*, id., 79.

² *Platt v. Gilchrist*, 8 New York Legal Observer, 7.

the premises by paramount title, and prayed that the foreclosure and sale might be deferred until this suit should have been determined. It was held by Mr. Justice Mason, who delivered the opinion of the Court, that although after eviction, relief would be extended in order to prevent circuity of action, yet until that event, the Court had no authority to interfere. "The purchaser in this case promised to pay the purchase money at stipulated periods, and the seller covenanted, that if at any time the title should fail, and the purchaser be evicted by a paramount title, he would refund the purchase money with interest. The possibility that the title might fail, and the purchaser be evicted, was in the minds of the parties. They might also have provided, that in case of a claim being made by title paramount before actual payment of the consideration money, the right of the vendor to call for its payment should be suspended. But this they have not thought proper to do, and this Court can with no more propriety add such a clause to the contract, and suspend the collection of the purchase money, than it can suspend the collection of rent expressly covenanted to be paid, upon the destruction of the buildings, where the parties have not themselves provided against it."¹

¹ "The Court, moreover," continued the learned Judge, "if it interfere at all, must do so upon the simple fact of a claim having been made by suit, without reference at all to the character of the claim. . . This court cannot try the title. Nor can it speculate upon the probabilities of the result of a suit, and grant or refuse relief according to a crude notion it might entertain as to the validity or invalidity of the adverse title. It is easy to see how dangerous the adoption of such a principle would be; what a temptation it would hold out to the bringing of actions by collusion in order to stay foreclosures, and how greatly it would affect the value of mortgage securities of this character. . . This decision may operate severely on the defendant in this case, and especially if the adverse claim shall turn out to be well founded;

The general principle recognized by this class of cases has been approved and enforced in most of the other States; and it seems to be well settled, that where the only covenants in the deed are for quiet enjoyment or of warranty, and so long as there has been no eviction actual or constructive, equity will, as a general rule, refuse to entertain a bill for relief, either by way of enjoining the purchase money,¹ or *a fortiori* by rescinding the contract;² and although it has been at times intimated that the presence of a covenant for seizin may in some cases fortify the position of the purchaser,³ yet it does not appear that

but a contrary decision would operate with severity on the plaintiff, if the title shall prove good. He is, moreover, only pursuing his legal remedy for a debt admitted to be due, while the defendant has all the protection for which she stipulated in the event of the title proving defective."

¹ *Barkhamstead v. Case*, 5 Connect., 528; *Whitworth v. Stuckey*, 1 Richardson's Eq. R., 408; *Ralston v. Miller*, 3 Randolph, 44; *Yancey v. Lewis*, 4 Hen. & Munford, 390; *Thompson v. Jackson*, id., 507; *Beale v. Seively*, 8 Leigh, 658; *Clanton v. Burges*, 2 Dev. Eq., 13; *Miller v. Long*, 3 Marsh; 334; *M'Coy v. Chiles*, 5 Monroe, 259; *Rawlins v. Timberlake*, 6 id., 233; *Simpson v. Hawkins*, 1 Dana, 305; *Elliott v. Thompson*, 4 Humph., 99; *Miller v. Owen*, Walker, 244; *Anderson v. Lincoln*, 5 Howard, (Miss.) 279; *Coleman v. Rowe*, id., 460; *Vick v. Percy*, 7 Smedes & Marshall, 256; *Walker v. Gilbert*, id., 456; *McDonald v. Green*, 9 Smedes & Marsh. 138; *Green v. McDonald*, 13 id.; *Stone v. Buckner*, 12 id., 91; *Latham v. Morgan*, 1 Smedes & Marsh. Chanc., 618.

² *Prevost v. Gratz*, 3 Washington's C. C. R., 439; *Greenleaf v. Queen*, 1 Peters, 138; *Patterson v. Taylor*, 7 Howard (U. S.) 132; *Legget v. M'Carthy*, 3 Edw. Ch., 324; *Woodruff v. Bunce*, 9 Paige, 443; *Whitworth v. Stuckey*, 1 Rich. Eq., 409, (see the able remarks of Harper, Ch., in that case;) *Van Lew v. Parr*, 2 id. 321; *Maner v. Washington*, 1 Strobhart Eq. R., 171; *Long v. Israel*, 9 Leigh, 556; *Lewis v. Mortin*, 5 Monroe, 1; *Vance v. House's heirs*, 5 B. Monroe, 537; *Buchanan v. Alwell*, 8 Humph., 518; *Roberts et al. v. Woolbright*, 1 Geo. Decis, 98; *Beck v. Simmons*, 7 Alab., 76; *Wilty v. Hightower*, 6 Smedes & Marsh. 345. The full and separate examination of the cases thus referred to, would demand more space than can be allotted to them here, and I have, therefore, only attempted to refer the student to the principles by which these cases profess to be governed.

³ *Long v. Israel*, 9 Leigh, 569; *Simpson v. Hawkins*, 1 Dana, 305; *Ward v. Grayson*, 9 id., 287.

the cases generally draw much distinction between the different covenants for title.¹ It frequently happens that a purchaser accepts his deed with full knowledge of the defect or incumbrance, and with the intention of relying upon the covenants in that deed for his protection.² In such case, to enjoin the collection of the purchase money because of the presence of a covenant for seizin or against incumbrances, would be to make for the parties a contract they did not make for themselves; and it would seem to be a proper rule, that the interference of equity should be refused wherever the purchaser's knowledge and the state of facts continue to be the same as they were at the time of the conveyance.³ In many of the cases upon this subject, the fact of this knowledge on the part of the purchaser was strongly relied on by the Court as a ground for refusing relief; and although it is well settled that such knowledge is no bar to his recovery upon the covenants themselves in a court of law,⁴ yet it is obvious that it should operate strongly, if not conclusively, against his right to equitable relief, where these covenants are not yet so broken as to give a present right to actual damages.

Where, however, a purchaser would be entitled at law to defend himself from payment of the purchase

¹ In *Woods v. North*, 6 Humph., 309, a covenant for seizin given by an executor who had no power of sale was put upon the ground of a representation made by him, and the contract was therefore rescinded on the ground of misrepresentation. See *Ingram v. Morgan*, cited *infra*, p. 533.

² See *supra*, p. 123, *et seq.*

³ The able opinion of Mr. Chief Justice Gibson in *Lighty v. Shorb*, 3 Penn. R., 447, may be read with great profit in this connection, though the student must be careful not to consider the Pennsylvania cases generally on this subject as having more than a local application.

⁴ *Supra*, p. 123.

money, either wholly or partially, and has had no opportunity of doing so, a court of equity will not hesitate to grant relief according to the peculiar circumstances of the case. This may be done in various ways; by enjoining the collection of the purchase money, either temporarily or permanently, by awarding issues of *quantum damnificatus*,¹ or even, in some cases, where the eviction has been total, by decreeing a rescission of the contract, and a return of the purchase money already paid.

Thus where² judgment was obtained upon a bond given for the payment of the residue of purchase money, and before the execution of the deed which contained covenants for right to convey and of warranty, the vendor became surety upon a judgment, under which, after the execution of the deed, the use of the property for seven years was levied on and sold, and possession recovered by the sheriff's vendee, "the Court, upon bill, answer and exhibits, having ascertained by a writ of inquiry the damages which the complainant had sustained by reason of the incumbrance, decreed a perpetual injunction against the judgment to the amount of the assessment and costs."

So where³ after a bill had been dismissed in which

¹ The right to assess damages through the machinery of a court of equity cannot be doubted in cases in which the claim for damages is necessarily incident to the relief and inseparable from it. See 2 Story's Eq. Jur., § 796, where most of the authorities are collected. Lord Kenyon in *Denton v. Stewart*, Cox, 258, and Sir W. Grant in *Greenaway v. Adams*, 12 Ves., 395, carried this right further than has been sanctioned by later cases; *Todd v. Gee*, 17 Ves., 277. See the remarks of Lord Cottenham in *Sainsbury v. Jones*, 5 Mylne & Craig, 1; *Hatch v. Cobb*, 4 Johnson, 560; *Kempshall v. Stone*, 5 id., 194. See *Coster v. The Monroe Manufacturing Co.*, 1 Green's Ch., 476, and *Hopper v. Lutkins*, 3 id., cited *infra*.

² *Shelby v. Marshall*, 1 Blackford, 385.

³ *Luckett v. Triplett's administrators*, 2 B. Monroe, 39.

the purchaser had sought to enjoin a judgment obtained for purchase money, on the ground of an anticipated eviction, another bill was filed setting forth that since the former decree the purchaser had been actually evicted under an action of ejectment, in which his vendor and himself had been co-defendants, it was held that the judgment should be perpetually enjoined.

So where the defendants to a bill filed to foreclose a mortgage given for the purchase money of land sold to them, with covenants for quiet enjoyment, for further assurance and of warranty, proved that the title was defective—that an ejectment had been brought, of which the complainants were notified, and required to defend—judgment entered in favor of the paramount title, and execution issued, and that the defendant to avoid a dispossession, purchased this title, the Court held that the amount thus paid should be deducted from the mortgage debt, and referred the case to a master to ascertain the damages thus due for a breach of the covenants.¹

¹ *Coster v. The Monroe Manufacturing Co.*, 1 Green's Ch. R. 476. "I confess," said the Chancellor, "I have not been able to find this subject considered in the cases as I had expected, and yet it appears to me so obviously correct in principle, that I cannot doubt its propriety. The great objection is the difficulty in this court undertaking to settle unliquidated damages. I know this is a difficulty, and yet in some cases a court of equity will, to effectuate justice, settle damages which are unliquidated. But if this obstacle should be deemed insuperable, still it would constitute no sound objection to the court staying the complainant's recovery on his mortgage until a reasonable opportunity be afforded the defendant to ascertain his damages at law, and then allow that amount to be offset. Which of these courses to ascertain the damages under the covenant, should be pursued, might depend on the peculiar circumstances attending the case; but it would seem to me, it should, as a general rule, be referred to a master, unless the complainant requires a trial at law. If the defendant claims the allowance here, he should be content with the forms of proceeding in this court, which is by reference to a master. To settle the damages, and thus close the whole

There have been exceptional cases which seem to determine that although an assertion and prosecution

controversy in one action, accords well with the familiar principles of a court of equity, of preventing a multiplicity of suits." But in the recent case of *Hopper v. Lutkins*, 3 Green. Ch. 149, a purchaser filed a bill for an injunction, setting forth that the defendant had sold to him certain mills and water rights with covenants for seizin, for right to convey, against incumbrances, and of warranty; that soon after, the defendant executed to him a bond to indemnify the complainant against an adverse suit brought by an adjoining owner to recover damages for an overflow of the dam by reason of its being at a greater height than the defendant had had a right to keep it; that the defendant was suing for the consideration money, and was speedily becoming impoverished. It was a part of the complainant's case, that the covenants were to have been so drawn as expressly to include the right to keep the dam at this height, but this was denied by the answer. The court held that the only equity in the bill was, the charge of mistake, which was wholly denied; but that giving the complainant the full benefit of the covenants, the case was clearly distinguishable from those in which a mortgagee was seeking the aid of that court to foreclose. "To carry out the relief sought, the injunction must continue until all the damages which the complainant can be put to, (and which the covenants are designed to protect him against,) are ascertained and settled. This would be a very uncertain period, and proves to my mind, that a rule of this kind would be productive of great injustice. Whether these suits will ever be brought, or if brought will be repeated, is all beyond the power of this court to know, as the action of the parties is beyond its power to control. How can this court, from the very course of its proceedings, ascertain, in any satisfactory manner, the damages sustained by the flow of this water? Even at law, it is often difficult to come to a result. I have been furnished with no case that goes the length here desired. The complainant's counsel has referred me to the case of *Johnson v. Gere*, 2 John. Ch. R., 546, but that is by no means like the present. There, the title to a part of the property sold was defective, and an ejectment was commenced for recovery of the possession. The Chancellor enjoined the suit at law on the bond for the purchase money, and also proceedings on the mortgage, until the ejectment should be determined. This is widely different from settling damages arising from the overflow of lands. If a mortgagor is deprived, by a trial at law, of the half or other share of the land which he purchased, a computation may be made by a master of the value of that share, and it can be deducted from the amount of the mortgage; but how he would ascertain and adjust all the damages which this complainant may sustain, by maintaining the dam in question at its present height, is more than I am able to discover. It would be impracticable, in my view of the case, to do so with any certainty. It is true, that the same principle pervades both cases, that of preventing circuity of actions, and allowing a set-off of damages under covenants against the purchase money.

of an adverse title may not, of itself, be a sufficient ground to entitle a purchaser to equitable relief, yet that such an assertion and prosecution, when coupled with the insolvency or non-residence of the party bound by the covenants, form together an equity, sufficient to bring the case within the *quia timet* jurisdiction which, in extraordinary cases, courts of equity have exercised.¹

The difference is, that in the one case it is practicable to do so, and in the other it is not. In the recent case in this Court of *Coster v. Monroe Manufacturing Company*, 1 Green's Ch. R., 467, I went upon the force of authority so far, after a judgment had been obtained in ejectment against the mortgagor for a part of the premises, for which he gave the mortgage, and after a repurchase made by him of that part from the plaintiff in ejectment, to refuse a decree for sale on the mortgage, until the damages the defendant had sustained under his covenants were ascertained by a master and credited on the mortgage. I still think that view of the case correct and attainable, but I do not see how it can be pressed further, so as to reach every possible case of damages arising under covenants."

¹ Sir Thomas Clarke, in speaking of the *quia timet* jurisdiction of equity, said, "Though this is a jurisdiction this court has often exercised, yet it will be extremely tender in so doing, because it materially varies the agreement of the parties at the time of the transaction." *Flight v. Cook*, 2 Ves. Sr., 620.

Mr. Justice Story, after referring to the old common law writs of *quia timet*, of which the *warrantia chartæ quia timet implactari* was one of the most prominent, (Co. Litt., 100, a, see *supra*, p. 24, 181,) remarks that, "bills in equity *quia timet* are in the nature of writs of prevention to accomplish the ends of precautionary justice. They are, ordinarily, applied to prevent wrongs or anticipated mischief, and not merely to redress them when done. . . . So courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principles that they will entertain a bill *quia timet*." Story's Eq. Jur., § 826, 850, citing *Ranelagh v. Hayes*, 1 Vern., 189, S. C., 2 Ch. Cas., 146; *Champion v. Brown*, 6 John. Ch., 406, "it being unreasonable that a man should always have a cloud hanging over him." These cases however must not be deemed as having a general and broad application. See *Funk v. Voneide*, 11 Serg. & Rawle, 116, though in that case Mr. Justice Duncan treated the jurisdiction much more as a matter of course than is really the case. For cases in which this jurisdiction has been exercised, the student is referred to *Redd v. Wood*, 2 Geo. Decis, 174; *Green v. Hankinson*, Walker, 487; *Cates v. Loftus*, 4 Monroe, 439; *Peebles v. Estil*, 7 J. J. Marsh., 408; *Lewen v. Stone*, 3 Ala., 485; *Patterson v. Smith*, 4 Dana, 153; *Bradley v. Commissioners*, 2 Humph., 428. The jurisdiction is often invoked by a re-

Thus, in an early case in Virginia,¹ an injunction was held to have been properly granted to restrain proceedings on a bond given for the purchase money of land, conveyed with covenant of warranty, upon the allegation that a suit was actually being prosecuted under a paramount title, and that the vendor was insolvent. So in a recent case in Tennessee,² the purchaser filed his bill to enjoin a judgment obtained on a note given for the purchase money of land, conveyed with covenants for seizin and of warranty, on the ground that his vendors had but an equitable title, and that a bill had been filed to subject the land to sale for a balance of purchase money still remaining unpaid by them, and it was held that the complainant would be without relief, but that his vendors were admitted to be utterly insolvent, and a judgment against them would be worthless.³ So in a recent case in Georgia,⁴ it was held that an injunction had been properly granted upon a bill setting forth that the complainant feared a loss of the land under prior incumbrances covered by his covenants, and that the vendor was a non-resident.⁵

mainder man for his protection against the tenant for life; *Chisholme v. Starke*, 3 Call, 25; *Yancey v. Holladay*, 7 Dana, 230; *Lewis v. Hudson*, 6 Ala., 463; *Henderson v. Vaulx*, 10 Yerger, 30.

¹ *Stockton v. Cook*, 3 Munford, 68.

² *Ingram v. Morgan*, 4 Humphries, 66.

³ The Court, however, seemed to be of opinion, that but for the covenant for seizin, the vendor would have been without relief, as it was said, "This (covenant) differs from a covenant of warranty where there is no present right of action, and can never be till eviction, which may never take place; and where, therefore, a court of Chancery will grant no relief against the payment of the consideration on the joint ground of a defect of title, and the insolvency of the vendor."

⁴ *Clark v. Cleghorn*, 6 Georgia, 225.

It was also held, that upon the filing of the answer denying the facts on which the equity of the bill was based, the injunction should be dissolved.

But where there is no actual prosecution of the paramount title or incumbrance, it is well settled, that the insolvency or non-residency of the vendor will not, when coupled with the mere existence of such title or incumbrance, give to the purchaser a right to equitable relief. Thus, in a late case in Mississippi,¹ where there was no eviction, actual or threatened, it was held, that under the repeated decisions in that State,² under such a state of facts, the insolvency of the vendor could not alter the position of the purchaser. So in a recent case in South Carolina, where the purchaser, after having been ten years in possession, was advised by his counsel that there was an outstanding title in minor children, and filed a bill for a rescission of the contract, alleging the insolvency of his vendor; upon the facts in the bill being admitted in the answer, the Court held that it was impossible to assimilate the case to a bill *quia timet*.³

In *Vance v. House's heirs*, 6 B. Monroe, 540, it is said, "a bill for the dissolution of the contract cannot be sustained, and the payment of the consideration enjoined, except in the case of fraud, insolvency, or non-residency of the vendor, and a palpable and threatening danger of immediate or ultimate loss, without legal remedy, by reason of the defects in the title conveyed, and the inability of the vendee to protect himself against eviction under it. And to sustain such a bill after the vendee has accepted the conveyance, the *onus* lies on him to establish, to the satisfaction of the Chancellor, that the defect of title and imminent danger of eviction and loss exists." See also the remarks in *Woodruff v. Bunce*, 9 Paige, 444.

¹ *Latham v. Morgan*, 1 Smedes & Marsh. Ch. 618.

² The decisions referred to however, are not given. See the *dicta* in *Vick v. Percy*, 7 Sm. & Marsh. 256.

³ *Maner v. Washington*, 3 Strobbart's Eq. R. 171. "The purchaser," said Harper, Ch., "had the legal enjoyment of the land, in which he might never be interrupted; but if that contingency should occur, he had a plain and adequate remedy against the vendor for the breach of his covenant, and the possibility or even probability of his being unable to pay the damages at a future time, could not create such an equity in favor of the plaintiff as to bring his case within the principles of a bill *quia timet*. Wherever the purchaser anticipated the insolvency of his vendor, he might stipulate for sure-

So in a case in Kentucky,¹ it was held that if the insolvency of the vendor were to be a ground for equity to interfere, still a Chancellor ought not to go further than to the extent to which a court of law would do in assessing damages for the part lost. If equity could interfere by reason of the insolvency of the warrantor to arrest the payment of the purchase money, or any part of it, it would be only by clear evidence of eviction or undoubted defect of title, so as to show the covenant of warranty broken,² and by stopping payment of so much of the purchase money as was equal to the damages incurred by the breach. So in the same State, it was held that the admitted insolvency of the vendor was no ground for an injunction where one of the paramount owners, all of whom were minors, declared his intention of suing for the part belonging to him.³ So in a very recent case in the Supreme Court of the United States, where a purchaser bought with general warranty, and finding after the execution of his deed, that a complete chain of title could not be deduced, filed a bill for the rescission of the contract, on the ground of the defective title; and in a subsequent bill of revivor against the heirs of the vendor, alleged that he had died insol-

ties to the warranty, but when he had taken possession of the land, paid the purchase money, accepted a deed of conveyance, and executed the contract, he could not call upon equity, except upon the ground of fraud, to rescind it, but must rely upon the covenants of his deed for redress."

¹ *Rawlins v. Timberlake*, 6 Monroe, 232.

² It will be of course remembered that this covenant is only broken by an eviction, or something equivalent to it: *supra*, p. 242, *et seq.* And in Kentucky it seems to have been held, in some cases, that a judgment of a court of record in favor of the paramount title, was sufficient to constitute an eviction. Such a doctrine, however, does not generally prevail. See *supra*, p. 207, note 1.

³ *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 583. See this case, *infra*, p. 538.

vent, the Circuit Court of the Kentucky District rescinded the contract, but the Supreme Court were clearly of opinion, that unless the ground of insolvency alone was sufficient to sustain it, the decree of the Court below could not be upheld, and that it was not sufficient, the Court had no doubt.¹

In cases, however, where all the parties to the title are before the Court—the vendor, the purchaser, and the paramount claimant—and an equitable adjustment can therefore be made of their mutual rights, the fact of insolvency or non-residence seems to have been admitted to be a material circumstance. Thus, where in a case in Kentucky, upon a bill praying relief against a judgment² for the purchase money of

¹ *Patten et al. v. Taylor et al.* 7 Howard, 132. Mr. Justice Nelson, after citing the cases of *Bumpus v. Platner*, 1 Johns. Ch. 213; *Abbott v. Allen*, 2 id. 219; *Gouverneur v. Elmendorf*, 5 id. 79; *Simpson v. Hawkins*, 1 Dana, 305; *James v. McKernon*, 6 Johns. 543, said that these cases showed “that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that in such a case he must seek his remedy at law on the covenants in his deed.” The strongest modern case upon the subject of insolvency creating a distinct equity, seems to be the *Tuscumbia Rail-road Co. v. Rhoades*, 8 Ala. 206, where many authorities are collected and examined. The complainant being indebted to the company on an open account, the latter assigned it to a third party, who commenced suit and obtained judgment thereon. Pending the suit, the complainant paid for the company a large debt as surety for a claim existing before the assignment, and filed a bill to set off the amount thus paid, against the amount of the judgment; and it was held, (reversing, after a re-argument, their former opinion), that although independently of the insolvency of the company, the complainant had no right of set-off whatever, either in law or equity, yet that the existence of that fact introduced new relations between them, whereby the complainant was entitled to retain the debt due by him, independent of the manner in which it was created, until the company either relieved him from or indemnified him against his obligation. See also *Hupp v. Hupp*, 6 Grattan, 310.

² *Morrison v. Beckwith*, 4 Monroe, 73. There were, in fact, two judgments, but as to one of them it was held that the complainant had barred his equity, by representations made by him at the time of the transfer of

land, sold with a general covenant of warranty, it appeared that a prior mortgage had been given by a former owner of a large tract, of which this was part, that the greater part of the mortgage debt had been paid, and the mortgagor was willing to pay the balance, but the mortgagee refused to receive it till a certain suit had been determined; and the bill made both the mortgagee and mortgagor parties, together with the vendor, who it appeared was insolvent, it was held, that although equity would not, in general, grant relief where a contract was executed, but would leave the purchaser to his action on the covenants, yet that in the case of the insolvency of the vendor, it was competent for a vendee to go into equity without intending to rescind the contract, to procure the appropriation of the purchase money to removing the incumbrance, and that upon this ground alone could the bill be held tenable.¹ So in a late

the security, on which the judgment was founded. A similar decision was made in *Jaques v. Esler*, 3 Green's Ch.

¹ The following portion of the opinion of the Court, which was delivered by Mr. Justice Wells, will show the manner in which, when all the parties are before the court, their respective rights can be mutually adjusted. "As the complainants have *prima facie* shown a ground for coming into a court of equity, the question remains, what relief is to be granted? Is a perpetual injunction the proper redress? We conceive not. If that is granted, the complainants may forever keep the estate, and also this part of the purchase money. The proper redress must be, to awaken the mortgage from *Cosby* (the prior mortgagor), to *Sarah Beard*, (the mortgagee) and to remove its effects from the estate in controversy. If that can be done, without the application of the money in contest, then *Churchill*, (the holder of the judgment), will be entitled to a dissolution of the injunction; but if a part of this money is necessary to remove the burden, then the complainants can be entitled to relief as to such part only, not by being discharged from the payment of it, but by directing its payment for their security. By inspecting the mortgage, it will be seen, that the estate mortgaged is a large one, and the price considerable, and all but a small sum is now paid. It is a well known principle, that a mortgage binds every part of the land it covers, and each spot is subject to its operation, and when it is made to bear on

case, where a purchaser filed his bill to enjoin a judgment given for the purchase money of land sold with

purchasers of different parcels from the mortgagor, they are bound to contribute only in proportion to the value of the share that each holds, fixing that value at the date of the mortgage. *Stevens v. Cooper*, 2 John. Ch. Rep. 430. It is also a correct doctrine that as between these purchasers and the mortgagor, if he holds a proportion of the estate himself, such portion must first be subjected entire. If it discharges the demand, the purchasers are clear; if it does not, then they must contribute proportionably to make up the residue.

“Now it seems more than probable, even if Cosby has sold the whole estate mortgaged by him, so that the balance due from him must fall on every part equally, that the proportion of that balance, which will fall to the share of complainants, will not be nearly equal to the sum which they have in their hands, now claimed by Churchill. But if Cosby has not parted with the whole estate, but still retains a portion thereof, that portion may be more than equal to the discharge of the balance due on the mortgage; and these facts must be ascertained, before it can be clearly perceived what redress is to be given to the complainants.

“The proper mode to ascertain this, is to direct an account to be taken by a commissioner, of the sums paid and balance due, on the mortgage, between Cosby and Mrs. Beard’s representatives, showing the true balance; also of the value of the whole estate mortgaged, at the date of the mortgage, and of the part sold by Morrison, (the vendor,) to the complainants, so that the proportion of the mortgage money chargeable thereon, may be clearly seen. By the same proceeding it must be ascertained whether Cosby has sold the whole of the estate mortgaged by him, and to whom, or whether he still retains a portion thereof, and of what value. By the same commissioner, it may be ascertained whether Sarah Beard’s representatives still refuse to receive the money from Cosby, or Cosby declines paying it. If he receive, and he shall pay or secure it, then there will be no further obstacle to the dissolution of the injunction. If the obstruction is not thus removed, and Cosby shall retain at this time, a portion of the estate amply sufficient to discharge the balance due, and he will not otherwise indemnify the complainants, then he must be compelled to execute to the complainants a mortgage on the estate so retained by him, defeasible on his paying the balance due Sarah Beard’s representatives, and keeping them indemnified from that incumbrance, and in either of these events, the injunction against Churchill must be dissolved. But if it shall be ascertained, that Cosby has sold the whole of the estate mortgaged by him, then the proportion of the balance due, which is chargeable to the estate now in contest, must be decreed to Sarah Beard’s representatives, and the injunction of the complainants must be dissolved as to the residue. It might be equitable, to decree the amount for which the injunction shall be perpetuated in this

general warranty, on the ground that, by a prior partition, the more valuable portion of the land had been conveyed to one whose heirs he made co-defendants with the vendor, who it was admitted was insolvent, and the Court below granted an injunction, the decree was reversed by the Court of Appeals, on the express ground that no decree had been prayed for against those heirs, and that all of them had not been served with process.¹ So in a later case, it was held, after much consideration, that where the vendor was alleged to be insolvent, and there were just grounds for fearing an eviction, the Chancellor might interpose and suspend the payment of the purchase money, although the contract had been executed by a conveyance. But the Court regarded it as *indispensable*, that if there had been no eviction, all the parties interested should be brought before the Court, which could then settle their respective rights, and for want of this precaution, the decree of the Court below, enjoining judgment given for the purchase money, was reversed.² The principle of these cases is one of

event, in favor of Churchill against Cosby, as he would be entitled to stand by substitution in the place of a purchaser from Cosby.

“ But this cannot be granted to him, in this suit, as he has not interpleaded with Cosby, or shaped his defence in such a manner as to entitle him to decree against his co-defendants. His claim in this respect must, therefore, be left to some future mode of redress.

¹ *Wiley v. Fitzpatrick*, 3 J. J. Marsh, 582. The court held that had the complainant brought the proper parties before the court, and by a prayer in his bill compelled these heirs either to insist upon and exhibit their title to the part in question, or yield it to him, the decree of the court below would have been correct, unless it should appear that their title was invalid. But the contract should, as to that part, be rescinded if the vendor had conveyed no title to it, as it would be unjust to permit the purchaser to hold the deed for it, and yet have the injunction for the price of that part perpetuated. Leave was given to the complainant to amend his bill if he thought proper, so as to bring all the proper parties before the Court.

² *Simpson v. Hawkins*, 1 Dana, 310. The complainants had leave granted

general application, and has been elsewhere recognized.¹

Having thus attempted to examine the grounds upon which equitable jurisdiction has been exercised over the rights of vendors and purchasers, after their contract has been executed, there remains to be con-

to amend their bill, as in the case last cited. The following language was held by Mr. Justice Underwood, as to the complainant's equity to *rescind* the contract. "Regarding the protection which time had thrown round the vendors, perceiving no actual fraud on their part with the purchasers, and seeing that the contract has been fully executed by a formal conveyance with warranty of title against all the world, which warranty has not been broken by an eviction from the premises, and for aught that appears to us, never will be, we cannot concur with the Circuit Court in a total rescission of the contract. Indeed, where contracts are executed by conveyances, we are of opinion that there can be no rescission of a contract in any case, unless it has been tainted by actual fraud. If the warranty of title has been broken, so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seizin, he may apply to the Chancellor, where the vendee is insolent, to set off those damages against the unpaid portion of the purchase money. The ground upon which the Chancellor interferes in such cases, is the prevention of the irreparable mischief which otherwise might result from the insolvency. He ought not to act upon the principle of rescinding the contract. On the contrary, he should affirm the contract, and secure to the party such damages as he might be entitled to, for a partial or total violation thereof by the obligor. If a deed of conveyance be executed, for any quantity of land, and the vendee is put into possession thereafter, in case he loses half or three-fourths of the land, the law only authorizes a recovery, upon the warranty, of damages commensurate with the loss. The Chancellor must follow the law, and not lay hold of such a partial loss, and require the vendor to take back the portion of the land saved, and return the purchase money for that, under the idea of *rescinding contracts*."

¹ Davis v. Logan, 6 B. Monroe; Shannon v. Marselis, Saxton 413; Atwood v. Vincent, 17 Connect. 575.

As to the right of the *covenantor* to relief in equity from a judgment obtained against him on the covenant, see and consider McKinney v. Watts, 3 Marsh. (Kentucky) 268, and Sheppard v. Snell, 1 Monroe, 217. In Brooks v. Fowle, 14 N. Hamp. 248, the court held that although one who had no other interest in land than his liability on his covenants, might not singly maintain a bill which sought to quiet the possession by an injunction merely, yet that where other relief was sought and an account was to be stated between the covenantor and the defendant, or on a bill by the grantee for the purpose of quieting possession, the covenantor was a necessary party.

sidered the principles which, from an early period of the judicial history of the States of South Carolina and Pennsylvania, have been recognized and applied. In the former of these States, its courts of equity, indeed, have adopted the same principles which have been enforced elsewhere,¹ but in the common law courts, the rights of the purchaser were for a long period protected, upon what was thought to be equitable principles, at the expense of the vendor. Since the case of *Furman v. Elmore*,² it has become the settled law of South Carolina, that a covenant of warranty possessed also the properties of a covenant for seizin, and an eviction was not, therefore, held necessary to its breach. Hence it was held that if a purchaser, when sued for the contract price, could establish to the satisfaction of the jury, that he took nothing by his title, and that he would be ousted by the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title was a rescission of the contract, but because the damages on the covenant were exactly equal to the purchase money and interest,³ and it followed that when a portion of the land was covered by a paramount title which might, and in the opinion of the jury would so far deprive the party of the benefit of his purchase, the damages could be assessed *pro tanto*;⁴ and such is still the law at the present day. But there was another class of cases which, beginning with *Gray v. Hand-*

¹ *Whitworth v. Stuckey*, 1 Rich. Eq. 407; *Van Lew v. Parr*, id. 337; *Maner v. Washington*, 3 Strobbart's Eq.

² Reported in a note to *Mackey v. Collins*, 2 Nott & McCord, 189.

³ *Farrow v. Mays*, 1 Nott & McCord, 312; *Hunter v. Graham*, 1 Hill, 370; see *Van Lew v. Parr*, 2 Rich. Eq. 349, cited *infra*, 541.

⁴ *Farrow v. Mays*; *Furman v. Elmore*; *Van Lew v. Parr*.

kinson in 1793,¹ established the doctrine that where the object of the purchase was defeated, either by a failure of part of the title or of some incident to the purchase, the purchaser could be relieved at law by a rescission of the contract, although he might be still in possession. Such a doctrine, which, it was held, was a sort of equitable defence, cognizable as well at law as in equity on the ground of fraud, continued to prevail until the year 1829, when the courts began to retrace their steps, and by a series of decisions,² established the position that if the purchaser had not been evicted, the contract would not be rescinded in a court of law, principally on the ground that such a court has not the power to do full and adequate justice to the parties, and the result of the cases is said at the present day to be, "that in actions brought for the purchase money, the purchaser may make a clear subsisting outstanding title the ground of abatement for the contract value of such part of the premises as it may cover."³ Such a proposition must, it is apprehended, be understood only as applying to cases in which there are covenants which include the adverse title."⁴

¹ 1 Bay, 278.

² *Carter v. Carter*, 1 Bailey, 217; *Bordeaux v. Cave*, id. 250; *Westbrook v. McMillan*, id. 259; *Johnson v. Purvis*, 1 Hill, 326.

³ Per Johnson Ch. in the recent case of *Van Lew v. Parr*, 2 Rich. Eq. 241.

⁴ The current of authority in South Carolina having been fully explained in a very recent case, (*Van Lew v. Parr*, 2 Rich. Eq. 347,) by Mr. Justice O'Neill, I have of course, preferred his statement of the result of the cases to any which would otherwise have been attempted. "My present purpose," said that learned Judge, in delivering his opinion in that case, "is more to explain the various cases decided, in the courts of law, on the question how far an outstanding title can be set up as a defence at law, than for any thing else.

"The defence at law, before eviction, proceeds upon the ground that the covenant of seizin is broken by a want of title in the seller, and damages for

The doctrines which, from an early day, have prevailed in the State of Pennsylvania, with respect to the

this breach are allowed, as a discount. In the case of *Mackey v. Collins*, 2 N. and M'C. 186, it was held, that the warranty, in our deeds, drawn according to the Act of 1795, (see this statute referred to *supra*, page 406,) is both a covenant of seizin, and for quiet enjoyment, and that an action might be brought before eviction, on showing an existing paramount title in another. This was in conformity to the previously adjudged and well considered case of *Furman v. Elmore*, then unpublished, and apparently unknown to the bench or bar, but which was most fortunately brought to light and published in a note to *Mackey v. Collins*, 2 N. and M'C. 189. The same principle was affirmed in *Biggus v. Bradly*, 1 M'C. 500, with this qualification, that a purchaser in possession should not be allowed to purchase an outstanding title, and sue for a breach of the covenant of seizin. In that case, and many others, there is a good deal said about an implied warranty arising from a full price, in the sale of lands, as well as in the sale of chattels: but it is manifest such a doctrine has no foundation in law, and was not necessary for the decision of the cases at law, when they rested on the covenant of seizin in the deed. The principle ruled in *Mackey v. Collins* was re-affirmed in *Johnson v. Veal*, 3 M'C. 449. But in that case, another very important principle, and safeguard to the application of the doctrine, was settled and fixed,—that as the action lay for a breach of the covenant of seizin, before eviction, by showing that the grantor had not title at the execution of his deed, the statute of limitations began to run from the execution of the deed, and that in such a case, four years would bar his remedy by action of covenant.

“At law there formerly were three classes of cases, in which a purchaser could be relieved, in part or in whole, from the payment of the purchase money. 1st. Where there was a partial failure of consideration, as where part of the land sold and conveyed was covered by a paramount title, which might, and in the opinion of the jury would so far deprive the party of the benefit of his purchase. This is essentially matter of discount, and, as is decided in *Farrow v. Mays*, 1 N. and M'C. 312, can be given in evidence only under a notice of discount filed, and served on the opposite party. In such case the measure of damages to be allowed to the party on his covenant of seizin, is the *pro rata* value of the land covered by the paramount title, estimated by the purchase money and interest, and the relative value of the land thus taken off in the purchase, to the land remaining. *Furman v. Elmore*, 2 N. and M'C. 199 to 204. The 2d class is where the grantor when he sold had, or at the trial has, no title to the land. In such case, the vendee, having acquired no title, has of course no consideration for his promise, and hence if the action be on a parol contract, it may be regarded as a *nudum pactum*, and the vendee thus relieved at law. In such a case, as is said in *Farrow v. Mays*, the defence may be given in evidence under the general issue. But in an action on a specialty, as is explained in *Hunter v.*

right of the purchaser to detain the purchase money after the execution of his deed, by reason of an incum-

Graham, 1 Hill, 370, before the Act of 1831, the failure of consideration must have been specially pleaded, or set up by way of discount. That Act merely lets the party into his defence under a notice instead of a plea. In a suit on a specialty, therefore, it would seem the more prudent course for a defendant, (and the most consistent with legal rules) to regard his covenant of seizin as broken to the whole extent of his purchase money and interest, and to claim damages accordingly by way of discount. In such a case, if the jury should be satisfied, that in fact as well as in law the purchaser took nothing by his title, and that he will be ousted by the paramount title, they may find a verdict for the defendant, not on the ground that the failure of title is a rescission of the contract, but that the damages, on the covenant of seizin, are exactly equal to the purchase money and interest. In such a case there is no necessity for an appeal to equity to put the parties *in statu quo*. For the vendor's deed conveys no title to the vendee. Neither can the vendor claim an account for rents and profits. For his vendee is liable to the owner of the paramount title for the rent of the land during the time he may be in possession. *Taylor v. Fulmore*, (1 Rich. 52.) Both of these classes of cases have always been and still are regarded as constituting legal defences examinable and relievable in a law court. The 3d class of cases, where there was a good title in part and in whole conveyed by the vendor to the vendee, and the object of the vendee's purchase was defeated, either by a part failure of the title, or the failure of some incident to the purchase, represented by the vendor, or shown by the title, as resulting from the purchase, the purchaser formerly was held to be relievable at law, although he might be in possession, *by a rescission of the contract*. The case of *Gray v. Handkinson*, 1 Bay, 278, which seems to have been the beginning of this doctrine, held that a mill seat was the principal inducement to the purchase, and that being taken away by an older title, entitled the vendee to a rescission of the contract. In that case the Judges speak of the defence as a kind of equitable one, which was allowed *now* in a Court of Law as well as in Equity, *on the ground of fraud*. So far as fraud is concerned, I have no doubt *the defence is good any where*. But there is no fraud, where both vendor and vendee are alike ignorant of the defect: and that was the case in *Gray v. Handkinson*. In a note to that case, the rule of the decision is ascribed to the doctrine that a sound price warrants a sound commodity. It was followed by the case of *the State v. Gaillard*, 2 Bay, 11. In that case, the defence rested upon the ground, that when the land was sold, a plat was presented, which represented a fine copious stream of water running nearly through the centre of the tract, with a mill seat upon it: and that these advantages were the principal inducements to the purchase: that they had failed, inasmuch as the supposed stream was a dry gully three-fourths of the year. In that case, the doctrine, that a sound price warrants a sound commodity, was applied to land as well as to personality,

brance or defect of title, are believed to be peculiar to that State, though as respects his right to recover back

and that by the general terms of our discount law, a defence predicated of it, could be set up. In that case, the verdict of the jury rescinded the contract, notwithstanding the contract was executed both by the execution of titles and the delivery of possession to the vendee. It is possible that that case might stand upon the fraud resulting from the misrepresentation at the sale, without resorting to the wild doctrine, that there was an implied warranty from the price paid, in addition to the legal covenants of seizin and quiet enjoyment. These two cases were followed by many others, where from misrepresentation, or a failure of consideration, in part, which defeated the purchaser's object, in making the purchase, the contract was rescinded. The extravagant results to which we were conducted, may be illustrated by the case of the Commissioner in Equity *v. Robert R. Pearson et al.* In that case, the land had been sold under a decree in equity in the case of *Delilah Perry*, by her committee, *v. The Executors of Aaron Cotes*, dec'd., and purchased by the defendant, *Pearson*, at a great price. He received titles,—was in possession for years. He made several payments on his bond. At last, when sued, he succeeded in showing that there was an outstanding title to an undivided share of about one-eighth of the land, in persons who were not parties to the case under the decree in which the land had been sold. The constitutional court, against the finding of a jury, allowed the defence: and the vendee was permitted to rescind the contract. At length, however, the court awoke to the mischievous consequences of allowing such defences, and in the cases of *Carter v. Carter*, 1 Bail. 217—*Bordeaux v. Cave*, 1 Bail. 250, and *Westbrook v. M'Millan*, 1 Bail. 259, undertook to retrace their steps. In those cases, they declared, that where the contract of sale was executed by the delivery of titles and possession to the purchaser, and he had not been evicted, that for a failure of title to part of his purchase, although it might defeat its object, *the contract would not be rescinded in a court of law*; and that the party must seek relief in a court of equity. The reason assigned, that a court of law could not restore the parties to their original condition, by compelling the vendee to convey the title, which as far as the vendor had title, conveyed a good legal estate to him, and to account for rents and profits to the extent of the vendor's title, were certainly true, and showed that in such a case a rescission at law could not take place. The rule of these cases was admirably explained by the only surviving member of the excellent court which pronounced the decisions in *Carter v. Carter*, *Bordeaux v. Cave*, and *Westbrook v. M'Millan*, in the case of *Johnson v. Purvis*, 1 Hill, 326. In that case, *Johnston, J.* said—"The first ground of this motion is founded on a misconception of the cases of *Carter v. Carter*, 1 Bail. 217, *Bordeaux v. Cave*, id. 250, and *Hext v. Morgan*, decided in 1829, and from what has occasionally fallen from the bar in reference to these cases, I am led to conclude, that the impression is not unusual that want of title in the vendor of land, either in whole

what has been already paid, the law that has been referred to as prevailing elsewhere¹ is there fully recognized and enforced. In early cases in that State,² the maxim of *caveat emptor*, in the sale of real estate, was adverted to; and in *Dorsey v. Jackman*,³ the plaintiff, on paying his purchase money, took from the defendant, his vendor, a mere assignment of a commissioner's deed under a tax sale, and, on discovering that it conveyed no title, brought suit to recover the amount of the purchase money,⁴ and under the charge of the court below, obtained a verdict. The judgment was however reversed by the Supreme Court, on the ground that there being no implied warranty in the sale of real estate, a purchaser who had neglected to protect himself by proper covenants, could not, in an action for money had and received, recover what he had already paid; and this rule, which is in accordance with all the decisions elsewhere, has been consistently adhered to.⁵ In delivering their opinions, however, two of the learned mem-

or in part, is not a good defence to an action brought at law to recover the purchase money. *But these cases inculcate no such rule; they maintain, however, that a court of law cannot rescind a contract for the sale of land, on account of a partial failure of consideration, on the ground, principally, that a court of law has not the full power to do full and adequate justice to the parties.*' When these observations are understood as applying to an executed contract accompanied by possession of the land, they give a perfect exposition of the rule as settled by the Court of Appéals in 1829, and ever since inflexibly maintained by the law court."

¹ See *supra*, p. 461.

² *Boyd v. Bopst*, 2 Dallas, 91; *Caines' lessee v. Henderson*, 2 Binney, 108.

³ 1 Serg. & Rawle, 42.

⁴ The plaintiff having found out the true owner, purchased the title of him, but this in the case of a deed without covenants, is an immaterial point.

⁵ *Lighty v. Shorb*, 3 Penn. R. 447; *Kerr v. Kitchen*, 7 Barr, 86. It may be proper to repeat, that even where there are covenants, the purchaser's rights must be asserted in an action of covenant, and not in an action of assumpsit, See *supra*, p. 486.

bers of the Court¹ adverted to a distinction that might exist as to the purchaser's right, under such circumstances, to *detain* so much of the purchase money as should remain unpaid, but a definite expression of opinion on this point was, it was said, reserved until the determination of a case that had already been argued.

That case was *Steinhauer v. Witman*,² decided in 1815—the leading authority in Pennsylvania upon the point of detention of the purchase money. The defendant's intestate having received a deed with special warranty, gave a mortgage for the purchase money, and in an action on this mortgage, evidence was admitted by the Court to prove that the purchaser had been evicted from part of the mortgaged premises, under a title paramount to that of the plaintiff, and of course not covered by his covenants. The admission of this evidence was assigned for error by the plaintiff, on whose behalf it was urged in the Supreme Court, that to make him liable beyond the extent of his covenants, would be to confound all distinction between limited and unlimited covenants, and would be a violation of the agreement of the parties;³ and Mr. Chief Justice Tilghman, in delivering the opinion of the Court, admitted that this argument was not wanting in plausibility, and even in strength, and that if the question were entirely a new one, it would be difficult to give it a satisfactory answer. "But," he continued, "principles have been established, which are adverse to the plaintiff's reason-

¹ Mr. Chief Justice Tilghman and Mr. Justice Yeates.

² 1 Serg. & Rawle, 438.

³ Sugden on Vendors, 313, and *Bree v. Holbeck*, Dougl. 654, *supra*, p. 461, were the authorities relied on for the plaintiff.

ing, and must now be considered as the law of the land. The plaintiff does not deny, that the matter offered by the defendant would have been a good defence, if the contract had rested on articles by which the plaintiff had agreed to convey, and the defendant had covenanted to pay the purchase money: and yet, if these articles had only bound the plaintiff to convey with covenant of special warranty, it would have been as much against the spirit of the contract, to make him responsible for an eviction under a title paramount, as it is now, after he has conveyed with a covenant of special warranty. A distinction has been established between purchasers who have paid, and who have not paid, the purchase money. Those who have paid, have no relief, but those who have not paid, are relieved, in case of an eviction or manifest failure of title. There is a dictum to this purpose by Lord Commissioner Rawlinson,¹ and the point was directly decided in an anonymous case, 2 Ca. in Ch. 19.² The case of *Tourville v. Nash*,³ is also worthy of consideration, although not directly in point. There the purchaser paid part of the money, and gave bond for the residue. After giving bond, and before pay-

¹ The dictum thus referred to is in an anonymous case in 2 Freeman, 106. A bill filed to relieve a purchaser, on the ground of a fraudulent representation of value, was dismissed because of his *laches*, "and a case was cited by the Lord Keck. A purchaser brought his bill to be relieved where incumbrances were concealed, but was dismissed, for he ought to have provided against it by covenants; but it was said by Rawlinson, that if the purchaser had in that case had money in his hands, that this court would have helped him, but not after he had paid his money."

² This case (which is cited at length, *supra*, p. 462), has always been deemed as of doubtful authenticity and authority, and even in Pennsylvania has been said to be "not worthy of a moment's consideration." *Lighty v. Shorb*, 3 Penns. R. 45.

³ 3 Peere Williams, 307.

ment, he received notice of an equitable lien on the land which he had purchased, and it was held, that he should be subject to the lien, although he contended that the notice came too late, because he had no defence against the bond. But the Lord Chancellor answered, that though there was no defence at law, yet equity would, in such a case, stop payment of the money due on the bond.¹ I have reason to believe, that the courts of this State have been governed by the principles of the case in 2 Cases in Ch. 19, so that to set up a different rule now, would create confusion."² The judgment was therefore affirmed.

It is familiar, that the absence of a Court of Equity in Pennsylvania, gave rise to the practice of administering an equitable jurisdiction through the medium of common law forms.³ Such a practice would fully

¹ It must, however, be observed of this case of *Tourville v. Nash*, that the contract was not executed, but executory. If it had been executed by a conveyance containing no covenant which included the lien in question, equity could not have relieved the purchaser. *Supra*, 461.

² Mr. Justice Yeates, in delivering his opinion, said, "During the argument, I expressed my ideas fully of the general practice and usage which had uniformly prevailed in Pennsylvania, on this subject, both before and since the American revolution. I asserted the general understanding to have been, that in all cases, unless where it plainly appeared that the purchaser agreed to run the risk of the title, (either by special contract, or where it might fairly be inferred, from the consideration money being highly inadequate to the value of the premises at the time of the contract), he might defend himself in a suit for the consideration money, by showing that the title was defective, either in the whole or in part, whether there was a covenant of general warranty, or other engagement on the part of the vendor, that he had a good title, or a right to convey, or of quiet enjoyment by the vendee, or the like covenants, or not; and that, as to this point, it had never been deemed of the least moment, whether the vendor has executed a deed for the premises or not."

³ For a sketch of the system which there prevailed, the student is referred to Mr. Laussat's brief Treatise on Equity in Pennsylvania, which, although written before he was admitted to the bar, has been always justly regarded as not less remarkable for its accuracy than its elegance.

account for the application, in *Steinhauer v. Witman*, of such equitable principles as regulated the rights of the parties to contracts when *executed*, but it would not account for the application, in that case, of such equitable principles as govern *executory* contracts. The difference between these two principles, has already been referred to as a broad one:¹ before the consummation of the contract, the criterion of which event is the execution of the deed, the right of the purchaser to a title clear of defects and incumbrances, is an undoubted one; after that time, his rights are regulated both at law and in equity, solely by the covenants he has received. The effect, therefore, of the doctrine of *Steinhauer v. Witman* was, as will have been perceived, to blend these sets of principles together, and when taken in connection with the previous case of *Dorsey v. Jackman*, to give to a purchaser greater rights as a defendant, than he could have as a plaintiff.

In the case of *Hart v. Porter's executors*,² which followed in the year 1819, Mr. Chief Justice Tilghman, in referring to the decision in *Steinhauer v. Witman* said: "As the opinion of the Court in that case was unanimous, the law must be considered as settled. I will freely confess, that it was not without considerable reluctance, I agreed to the principle established in that case, nor did I make up my mind, until I had taken pains to ascertain what had been the understanding and practice in this State, for a great length of time. Being at length satisfied, that the prevailing opinion among lawyers, judges, and men of business had been, that until payment of the

¹ See *supra*, p. 459.

² 5 Serg. & Rawle, 201.

purchase money, the vendee might avail himself of a defence founded on defect of title, even where he had accepted of a conveyance with special warranty only, I thought it incumbent on me, not to oppose a principle, in which there was nothing contrary to equity. Indeed, the objections to this principle, are not founded so much on equity, as on policy and convenience. For where one party intended to convey, and the other expected to receive a good title, it is but equity, that the purchaser should have relief in case of any defect of title, although there was no express agreement to that purpose. Where the intent was, that the purchaser should run the risk of title, there is not a word to be said for him. And such intent may be fairly inferred, where he knew of the defect at the time of purchase, and made no provision against it, in his agreement.”¹

¹ In *Hart v. Porter's executors*, the plaintiffs having brought suit in the Court below, on three notes given for the purchase money, of land sold to the defendant with special warranty, the latter proved an outstanding title of dower in the wife of a former owner, to rebut which, the plaintiffs offered in evidence, a release from her husband and herself, subsequent to the commencement of the suit; which the Court, under objection, admitted, and then charged the jury, that as there had been no previous agreement to convey the land free from incumbrances—as the incumbrances existed at the time of the purchase made by the defendant—as he had a full opportunity of making himself acquainted with the circumstances of the title, and accepted of a conveyance without general warranty, he could not then avail himself of any defect of title, as a defence to the action, and was answerable for the whole of the purchase money. Upon writ of error to the Supreme Court, it was there held, that the evidence had been properly admitted. But the judgment was reversed, upon the ground of the charge. “It does not clearly appear to us,” it was said, “why this charge was given, if the release of dower given in evidence by the plaintiffs was effectual. Perhaps, there were other incumbrances not appearing on the record. At all events, it might mislead the jury, if it was erroneous, and we ought not to suppose that it was given without object or meaning. We are bound therefore, to consider whether it be erroneous.” After using the language quoted in the text, the learned Chief Justice continued: “I hold myself bound, therefore,

The principle announced in *Steinhauer v. Witman*, has been qualified and explained in many subsequent

by the decision in *Steinhauer v. Witman*, from which the case now before us differs in nothing but the circumstance of there having been no eviction by the party who had the right of dower. But here again, I consider the practice in the Courts of this State, as firmly established. We have no chancery. Matters of law and equity, must therefore be decided in the same Court, and on the same trial. What is to be done in a case like the present? The outstanding title of dower is notorious, although no suit has been brought on it. What can the defendant do? He has no means of compelling a suit; must he then pay his whole purchase money to-day, without a possibility of having it refunded, when he can make it appear that he is liable to be turned out of one-third of his possession to-morrow? Is there either reason, justice, or equity, in such a proceeding? I know that this matter is not without difficulty; because there may be other cases, in which it may be uncertain whether an eviction will ever take place, although the title be defective. But it is better to encounter difficulties, and endeavor to do equity as well as we can in each case, than adopt a sweeping principle, which may put it out of our power to do it in any case. The circumstances of every country must be considered by its courts of justice. What is good for one, may be ruinous for another. In this State, land may be considered almost as an article of commerce. Rapid transfers are made, and great quantities are held by persons who never saw their possessions. Titles, which by inspection of papers, appear perfectly good, may be defective, in consequence of circumstances attending the original survey, which can only be known by going on the ground. Purchases are made of unsettled lands, with a view of selling again to profit. In the course of this business, many suits are brought for the recovery of purchase money, and discoveries are made from time to time of defect of title, although no eviction has taken place. Under such circumstances, to adopt it as a principle, that there shall be no relief, because there has been no eviction, would be doing incalculable mischief. I am confident that the general sense and feeling of the country is against it; and although the very point may not have been solemnly decided by this Court, yet in practice, a defence founded on defect of title, without eviction, has been often admitted without opposition. When another state of things shall take place; when the lands now lying in a state of nature shall be cultivated; it may be necessary to alter the law; and it is always in the power of the Legislature to do it. Considering then that it was decided in the case of *Steinhauer v. Witman*, that a purchaser not having paid his money, may defend himself under a defect of title, where part of his purchase has been evicted, although he has accepted a conveyance with no more than special warranty, and considering that where there has been no eviction, it would be against equity, to compel payment of the whole purchase money, for a defective title, I am of opinion, that the charge of the Court of Common Pleas was erroneous. The judgment, therefore, should

cases,¹ and their result may be stated in general terms, to be, that in Pennsylvania, a purchaser may defend himself from payment of the purchase money, by reason of a clear outstanding defect or incumbrance, unless the intention was, that he was to run the risk of it. Such an intention may be either shown by direct evidence, or be implied by circumstances; of which the most material are, in general, notice on the part of the purchaser, combined with the absence or presence of covenants, which include the defect or incumbrance.

be reversed. It is to be understood, that this opinion is confined to the case of a purchaser who has no covenants on which he can have recourse to the seller. Where such covenants exist, it is not meant now to say, at what time, or in what manner, the purchaser is to have his remedy on them."

It is difficult to perceive why the judgment was reversed in this case, since, by the evidence, which the Supreme Court held to have been properly admitted, it appeared that at the time of the trial, the only outstanding title which was relied on by the defendant had been extinguished, and for any thing that appeared upon the record, a second trial must, therefore, have resulted similarly to the first. This case should be read in connection with *Ludwick v. Huntzinger*, *infra*, 554.

¹ Thus in *Friedly v. Scheetz*, 9 Serg. & Rawle, 161, where the principle was held not to apply to purchasers at a sheriff's sale, Mr. Justice Duncan said: "Steinhauer v. Witman is not well understood. It does not go to the wild length, as some have supposed, that a man who purchases a title with all its defects and imperfections, and whose conveyances contain no covenants of warranty, is not bound to pay the bonds he has given for it. For Mr. Justice Yeates, the great advocate for the departure from the general rule, both of law and equity, of *caveat emptor* in the sale of lands, yet restrains its operations, for he puts it on a very rational principle. The obvious and plain rule he says, is what was the true meaning of the contracting parties; was it contemplated mutually, that the purchaser should hold the land under a good title, or that he should run his chance of getting a title, and be exposed to all hazards."

But it has been well said by Mr. Chief Justice Gibson, that "the greatest practical evil of the doctrine is, that it subjects the contract to the control of a jury, prone to forget that to cut a man loose from his bargain from motives of humanity, is the rankest injustice; and from this, it would seem sound policy to extend it no further than it has been already carried." *Lighty v. Shorb*, 3 Penn. R. 451. *Supra*, p. 558.

The cases will be attempted to be considered as divided into three classes.

1. Where the defect or incumbrance is unknown.
2. Where there is a known defect or incumbrance and no covenant.
3. Where there is a covenant against a known defect or incumbrance.

1. Where the defect or incumbrance is unknown to the purchaser, it is of course impossible that he could have intended or expected to run the risk of it, and hence, under this head, two questions arise : first, what defects or incumbrances will entitle the purchaser to detain the purchase money ; and secondly, what will be deemed an absence of notice on his part.

With respect to the character of the defect or incumbrance, although it is said, that the contract is still executory as to the unpaid purchase money, yet this expression must not be understood to mean, that a purchaser will, after the execution of his deed, have a right to detain, in every case in which equity would refuse to decree a specific performance by him. While on the one hand, it is not necessary that an eviction should have taken place,¹ or the incumbrance

¹ *Carnahan v. Hall*, Addison, 127 ; *Gouche v. Helmbold*, 1 Miles, 407 ; *Hart v. Porter*, 5 Serg. & Rawle, 201 ; *Share v. Anderson*, 7 id. 61. "The effect of incumbrances," it was said in the latter case, "as showing failure of consideration, or a defect in the title, is certainly different in Pennsylvania from what it is in England ; there, an eviction at law, is an indispensable ingredient of a claim for relief against payment of the purchase money. Here, it is sufficient that eviction *may* take place."

The purchaser may, of course, by his own acts, deprive himself of his defence from payment of the purchase money, as in *Gilkeson v. Snyder*, 8 Watts & Serg. 200, where a third person having advanced money to the vendor in part payment of the purchase money, upon the representations of the pur-

have been paid off by the purchaser,¹ yet on the other, it will not be sufficient, if the title can merely be shown to be doubtful, or the incumbrance merely contingent.²

chaser, that he would be safe in doing so, it was held that the latter could not, in an action on a bond given for the amount thus advanced, defend himself by reason of a defect of title.

It will have been observed, that in the leading case, *Steinhauer v. Witman*, there had been an eviction of part of the land. So in *M'Ginnis v. Noble*, 7 Watts & Serg. 454, the land was sold under previous incumbrances, and purchased by the defendant, who was allowed to detain *pro tanto*, but not to set up these facts as a total failure of consideration; though it was said that such would have been the case, if the land had been bought by a stranger. See this case approved in *Dentler v. Brown*, 1 Jones, 299. In *Stahley v. Irwin*, 8 Barr, 500, the owner of a mill and tavern constructed a pipe to carry water from the former to the latter. He then sold the tavern, and subsequently sold the mill property to another. The purchaser had no notice of the easement, and in an action for the purchase money, it being proved that the existence of the easement would lessen the benefit of his purchase, the jury was instructed that the value of the easement might be deducted from the amount of the purchase money. In neither of these cases does it appear that there were covenants.

Morris v. Buckley, 11 Serg. & Rawle, 168, was said by the Court, to come within the principle of *Steinhauer v. Witman*, but the case would probably have been similarly decided in any court, as there was a general warranty, and the purchaser had never been able to get the possession, which is, in general, held to be a constructive eviction. (See *supra*, p. 223.) The same may be said of *Poyntell v. Spencer*, 6 Barr, 257, where the purchaser had, to prevent an actual eviction, taken a lease under the paramount title which had been established by a judgment, of which his vendor, who had sold with general warranty, had notice. In these cases the defence was rather a legal than an equitable one.

¹ Thus in *Coke v. Kelly*, 13 Serg. & Rawle, 165, although the purchaser had actually paid off an outstanding mortgage, it was held by the Court, that its payment was not necessary in order to enable the defendant to deduct its amount from the purchase money. So in *Roland v. Miller*, 3 Watts & Serg. 390, where the title of the vendor was subject to charges in favor of the heirs of the former owner, a conditional verdict was found for the plaintiff, with stay of execution until releases from these heirs should have been obtained.

² *Penn v. Preston*, 2 Rawle, 19; "I do not wish," said Mr. Justice Kennedy, in *Ludwick v. Huntzinger*, 5 Watts & Serg. 58, "to be understood as saying, that a superior title outstanding in a third person, when shown clearly to exist, and that he claims the land by virtue of it, will not be a

With respect to what will be deemed to be notice on the part of the purchaser, it would seem that mere

good defence against payment of the purchase money, or any portion thereof, though a deed of conveyance has been executed by the vendor to the vendee, unless it was explicitly agreed and understood between them, at the time, that the vendee was to take the title of the vendor, such as it was, at his own risk; on the contrary, I admit, that according to the authorities it will be a good defence. But I wish to be distinctly understood as laying down the principle that in order to make such outstanding title a good defence, in such cases, it must be clearly shown to be indubitably good, and that the land is actually claimed under it. It is proper, however, to observe that a different principle governs, where the contract for the purchase of the land remains *in fieri*, and the action is brought on the contract itself with a view to enforce the payment of the purchase money according to its terms. There if it should appear that the title of the vendor to the land is any wise doubtful, the vendee will not be held bound to pay the purchase money for it; *Stoddart v. Smith*, 5 Binney, 365, (and see *supra*, p. 431,) unless it should also appear that he had expressly agreed to do so; *Dorsey v. Jackman*, 1 S. & R. 42; *Pennsylvania v. Sims*, Add. 9." See the decision in this case, *infra* p. 558. The expression of Mr. Justice Yeates in *Stoddart v. Smith*, that "a man will not be compelled to pay for lands which he has purchased, though even with general warranty, where it plainly appears that he cannot obtain a good right therefor," were *obiter dicta* in the case, which was one where no deed had been executed, and they must be considered as limited to the application pointed out in *Ludwick v. Huntzinger*.

The distinction noticed in that case as to the rights of the parties while the contract is *in fieri*, and after the deed is executed, although by no means so broad a one as exists elsewhere, (see *supra*, p. 459,) yet still is recognized to a greater extent in Pennsylvania than the language of some of the earlier cases would seem to imply. "If the vendee discovers," said Mr. Justice Kennedy in *Moore v. Shelby*, 2 Watts, 259, "before he has paid the consideration or any part of it, that the property is under incumbrances which the vendor cannot discharge, he has a right to insist upon rescinding the contract, and may therefore refuse to pay for it, or do to any thing on his part towards carrying it into execution. So in *Withers v. Baird*, 7 Watts, 229; *Colwell v. Hamilton*, 10 id. 16; *Gans v. Renshaw*, 2 Barr, 34; (unless the purchaser retains possession of the land, and buys in the outstanding claims, in which case he will of course be compelled to pay the price agreed on, with a deduction from the amount thus paid by him. (*Renshaw v. Gans*, 7 Barr, 17.) But, as was said by Mr. Justice Sergeant in *Magaw v. Lothrop*, 4 Watts & Serg. 321; "if he accepts a deed under the contract, the vendor may sue for the purchase money on bond or otherwise, though if it should turn out that there was a defect of title or outstanding incumbrance, he would be entitled to recover; the jury allowing to the defendant

constructive notice will not be sufficient to deprive a purchaser of relief under the doctrine we are now considering. Such seems to have been the opinion of the Court in *Moore v. Shelby*,¹ and in *Roland v. Miller*,² where the land was, under decree of the Orphans' Court, subject to charges in favor of the vendor's co-heirs, it was argued that the purchaser had notice by the records of that Court of the existence of the incumbrances, but the Supreme Court held that it was not pretended that the defendant had any actual knowledge of the incumbrance at the time of the agreement for the purchase, or even at the time that he received the deeds from the plaintiff. Indeed, neither of the parties seemed to have had a knowledge of the same, until some time afterwards. This being the case, it could not be supposed that any covenant contained in the deeds, was taken or inserted specially with a view to protect the defendant against the effect of it. The case then fell, it was said, within the authority of *Steinhauer v. Witman*.

2. Where there is a known defect or incumbrance, and no covenant, it has been already shown³ that the rule as generally settled elsewhere than in Pennsylvania, with respect to a purchaser's right to detain the purchase money, is, that if the defect or incum-

a deduction equivalent to the value. It would be no absolute bar to the action, to say that at the time the action was brought, the plaintiff had not conveyed a good and sufficient title, and this was the case of *Hart v. Porter*, 5 S. & R. 201." *Magaw v. Lothrop* proceeded upon the principle in equity, that in a suit for specific performance, the vendor may perfect his title at any time before final decree. Where, however, the incumbrances are not removed until after suit is brought, the purchaser is entitled to costs. *Coke v. Kelly*, 13 Serg. & Rawle, 165; *Withers v. Atkinson*, 1 Watts, 236.

¹ 2 Watts, 257.

² 3 Watts & Serg., 390.

³ *Supra*, p. 461.

brance is not covered by his covenants for title, the presumption that he intended to run the risk of it, is so strong as to admit of no evidence to the contrary,¹ and the purchase money cannot be detained under any circumstances into which fraud has not entered; and in the enforcement of these principles, equity follows the law.²

It would seem, however, that while such a principle has not been recognized in Pennsylvania to its full extent, with respect to a defect of title, its application has been altogether denied with respect to an incumbrance. In *Hart v. Porter*, it was said in the course of the decision³ that the intent that the purchaser was to run the risk of the title, might be *fairly in-*

¹ In cases of sales by sheriffs, commissioners, and the like, the purchaser, from the very nature of the transaction, necessarily buys at his own risk, and cannot detain the purchase money under any circumstances, by reason of incumbrances or defects of title. *Friedly v. Scheetz*, 9 Serg. & Rawle, 161. The converse of this rule, applies in cases of a partition and exchange, in both of which a warranty is implied; *Seaton v. Barry*, 4 Watts & Serg., 184; *supra*, 354. Where there is a deficiency in the quantity of the land conveyed, and there is no covenant that there shall be such a quantity, the purchaser cannot of course detain the purchase money. *Dickinson v. Voorhees*, 7 Watts & Serg., 357.

² In either of these cases, whether there are covenants or not, the fact of the purchaser's notice is one wholly immaterial; as, if he be entitled to damages, his notice cannot prejudice that right. *Supra*, p. 123. But under what has been styled the equitable principles of this doctrine in Pennsylvania, it has been shown, that while with respect to so much of the purchase money as is already paid, the contract is deemed an executed one, and the money cannot be recovered but by force of a covenant, yet that with respect to the unpaid purchase money it is still executory; or, as has been said by Mr. Justice Yeates in *Steinhauer v. Witman*, there is a *locus penitentiae* until the money is paid. Hence, must arise the question as to the real nature of the contract between the parties, and whether the purchaser agreed to run the risk of the title. In such a question, the fact of the purchaser's notice must necessarily be a principal ingredient, and the absence of a covenant does not possess the conclusive and binding effect that would elsewhere be given to it.

³ 5 Serg. & Rawle, 204, cited *supra* p. 549.

ferred when he knew of the defect at the time of the purchase, and made no provision against it.¹ In a subsequent case Mr. Chief Justice Gibson, referring to this expression, emphatically repeated that where there was a known defect, but no covenant or fraud, the vendee could avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain.²

¹ So in *Ludwick v. Huntzinger*, 5 Watts & Serg., 58, the defendant in an action on his bond, given for the purchase money of land conveyed to him with special warranty, offered to prove an informality in a prior tax sale, and a want of identity of the subject of the contract with the land purported to be conveyed. The Supreme Court held this evidence was properly rejected by the court below; that the evidence of a defect of title must be such as entirely to overcome that violent presumption which arises in favor of the defendant's having received a good title for the land, from the circumstance of his having, after inspecting it, approved it, by accepting the deed conveying it to him, and thereupon giving his bond for the purchase money; and if the purchaser took no covenant for his protection, "*it goes strongly to prove that he agreed, and was satisfied to take the title of the vendor pretty much at his own risk.*" This he unquestionably had the right and power of doing, if he pleased, and if it should happen to turn out differently from what he expected, he has but little, if any reason, to blame the vendor for it. It might be said with truth, that he bargained for the vendor's title merely such as it was, and that he obtained all he bargained for, even if he should afterwards lose the land by reason of a superior title to it in a third person." So in *Ross's Appeal*, 9 Barr, 497, it was said, quoting the language used in *Smith v. Sillyman*, 3 Wharton, 589, that where the defect is known, and not provided for, the presumption is irresistible, *in the absence of express stipulation*, that the vendee relied on his own judgment as to the soundness of the title.

² *Lighty v. Shorb*, 3 Penn. R., 451. "In *Hart v. Porter*," said the learned Chief Justice, "it was said that where a purchaser knows of a defect or incumbrance at the time of the bargain, without stipulating for a covenant or other security against it, he necessarily consents to take the risk of it on himself. An intendment to that effect, is consistent, not only with the reality of the transaction, but with the analogous principle of *Vane v. Lord Barnard*, Gilb. Eq. Rep. 6, in which the purchaser, having taken an agreement for a special covenant against a contingency that might never happen, was not allowed to detain the purchase money as an additional security, because his consent to rely on the covenant alone, was thought to be deducible from the very nature of the transaction. Is not his consent to bear a risk, known to him at the time, and not provided against, equally deducible from the

The case of *Drinker v. Byers*, however, sufficiently shows that the absence of a covenant and the presence

nature of the transaction? Not only every scrivener, but every purchaser, is aware of the value of a covenant, when a defect is known or suspected." *Vane v. Lord Barnard*, was a case of a marriage settlement, by which the defendant had, on the marriage of his son, conveyed, with a covenant against incumbrances, a part of his estate, which he had previously made subject to a charge in the event of his daughter's marriage; and Lord Cowper said, "notice or no notice of this incumbrance, was very material in this case; for where a covenant is in this manner, if any incumbrance is discovered between the executing the articles, and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged, even before sealing the deed of settlement, both on account of the fraud in concealing such incumbrance, and because it would be needless to enter into a covenant, which before entering into, is already known to be broken; but against all other incumbrances discovered afterwards, there is the party's covenant only. Now, where you have notice of an incumbrance before executing the articles, it is a stronger case than the last, for you consent with your eyes open, to accept the party's covenant against an incumbrance you were aware of; and when you have chosen your method of security yourself, this court will give no other, nor make the party do a further act, than by the articles he has agreed to do; and the rather in this case, for that the portion is not a certain incumbrance, but a contingent one; and therefore, it is reasonable to suppose, that my Lord Barnard would not be compelled to charge his remaining estate, at all hazards, to secure against an incumbrance that was but contingent, to the prejudice of his eldest son." See also *Clarke v. Jaux*, 3 Russell, 320.

In *Beidleman v. Foulk*, 5 Watts, 308, the question arose incidentally upon a point of evidence. Land which had been the property of an intestate was, after his death, sold with special warranty by five of his heirs, to the husband of the sixth, who brought an ejectment for a part of the premises against one who, being in possession, claimed to hold it under a prior deed from the intestate, which he alleged was meant to include that part, but which, on the face of the deed did not. One of the heirs being offered as a witness for the plaintiff, was rejected by the court below, on the ground that as the latter had given bonds to his vendors for the purchase money, he would, if he failed to recover the part in controversy, be entitled to a deduction for its value, and that the witness was, therefore, directly interested in the event of the suit. But on writ of error, Mr. Justice Kennedy, who delivered the opinion of the court, held that under the circumstances, the witness would be entitled to recover his full proportion of the purchase money, without any deduction whatever, notwithstanding the plaintiff should fail to recover, on the ground that the purchaser having notice of the defect, had made no provision against it.

"The claim of the defendant and his occupation of the ground," said the

of notice do not together form a *conclusive* presumption that the title was to be at the purchaser's risk.¹ The defendant in an action on a mortgage given for the purchase money of land sold with special warranty, offered in evidence a paper signed by the vendor some weeks before the execution of the deed, which stated that it had been represented to him by the defendant that a third party made pretensions to part of the land—that he, the vendor, believed such pretensions to be groundless, yet for the satisfaction of the purchaser he engaged to save him harmless, if it should appear that there was any justice in the adverse claim. The defendant then proved a loss of part of the land by ejectments under this claim, and the expenditure of various sums in their defence. Notwithstanding it was objected that the execution of the deed, which contained no covenant including the defect, merged all prior articles, it was held by the Supreme Court, that the evidence was properly admitted. Such a decision could not have been made if the purchaser's notice and the absence of a cove-

learned Judge, "being thus visible and known to them all, and the plaintiff buying with his eyes open, seeing the defendant in possession and enjoyment of the privilege, of which he now seeks to deprive him, yet requiring no provision in his contract for a deduction from, or return of any portion of the purchase money, in case he should be unable to recover the disputed ground from the defendant, but on the contrary, paying two-thirds of the purchase money in hand, and agreeing positively to pay the remaining third on the death of the widow, which might be on the next day for aught he knew, and during the interim, the interest on it annually, to her, leads inevitably to the conclusion that he was to pay the whole of the purchase money, whether the land in dispute was recovered or not. And this is in accordance with the principle laid down in *Furhman v. Loudon*, 13 Serg. & Rawle, 386, and affirmed in *Lighty v. Shorb*, 3 Penn. Rep., 452, that "when the purchaser is aware of a flaw, and provides not against it, he takes the risk of it on himself." See these cases cited *infra*, p. 566.

¹ 2 Penn. R., 528.

nant were to be deemed conclusive evidence that he was to run the risk of the title.¹

The result, therefore, would seem to be, that where there is a known *defect of title* and no covenant which includes it, the presumption is that the purchaser agreed to run the risk of the title, but this presumption is not so conclusive as to exclude evidence to the contrary.

But it would seem to have been also held that where there is an *incumbrance* of an amount less than that of the purchase money, and payable before or at the time when the purchase money ought to be paid; no such presumption arises, and the burden of proof rests upon the vendor to show that the incumbrance was intended to be in addition to the consideration named in the deed, and that the purchaser took the land *cum onere*.

This was the decision in the recent case of *Wolbert v. Lucas*,² where the plaintiff having issued a *scire facias* to recover the balance due on a mortgage given by the defendant for the purchase money of land conveyed to her with special warranty, the latter proved a mortgage given by a former owner of the land, which had been compulsorily paid off by her in instalments since the execution of the deed; and

¹ That the learned Chief Justice did not mean by the expression in *Lighty v. Shorb*, to say that where there was notice and no covenants, the purchaser was estopped from producing evidence to show that he did not mean to run the risk of the title, is clearly shown by the previous case of *Seitzinger v. Weaver*, 1 Rawle, 384, where he said, "The presumption of law is that the acceptance of a deed in pursuance of articles is a satisfaction of all previous covenants, and where the conveyance contains none of the usual covenants, the law supposes that the grantee agreed to take the title at his risk, or else that he would have rejected it altogether." It is then said that there may be cases where the acceptance of a conveyance will be but part execution of the articles, etc. *Drinker v. Byers* comes within this class.

² 10 Barr, 73.

produced a witness, who swore that at the time of making the contract, it proceeded upon the basis that the mortgage to be given by her to the plaintiff, was for the full value of the land, and formed the whole consideration of the purchase. On the other hand, the plaintiff produced a witness who swore that the contract was that the defendant would pay the paramount mortgage—that she would be responsible for it, and would take it on herself.¹ The Court below charged the jury, that the only question was whether the defendant knew of the paramount mortgage at the time she purchased; for if she did, she could not claim allowance for payments made by her on that account, there being no fraud or covenants. The jury having of course found for the plaintiff, the Supreme Court reversed the judgment, and held that if the defendant bought the premises for the amount of the mortgage given by her to the plaintiff, and that was the whole consideration, she ought not to pay more than she contracted for; and if there was more to pay than her deed called for, the plaintiff was bound to show it satisfactorily to the jury.

The charge of the Court below doubtless proceeded upon the language used in *Lighty v. Shorb*, that “if there was a known defect, but no covenant or fraud, the vendee could avail himself of nothing,” and if the Supreme Court had modified this direction by holding that these circumstances cast upon the purchaser the burden of proving that he did not intend to run the

¹ The student will, almost involuntarily, here recall the words of Mr. Chief Justice Gibson, cited, *supra*, p. 552, note.

² The Court then went further, and added, that under the evidence the defendant should have had the instruction of the Court in her favor, and a credit for all the payments made by her under the paramount mortgage. See Note 1 to the next page.

risk of the incumbrance, the decision would perhaps have followed the cases which have just been cited. But it is obvious that it went beyond these cases, and it would seem to establish the rule that where there is notice of an incumbrance and no covenant, these circumstances, which elsewhere would be conclusive against the purchaser, do not in Pennsylvania even raise a *prima facie* presumption against his right to detain the purchase money; and where the evidence is contradictory, the question as to the terms of the contract is not to be left to the jury as a question of fact, but the purchaser is, in every case, entitled to detain unless his vendor can show satisfactorily that he agreed not to do so.¹

¹ Although this case is correctly reported by Mr. McMurtrie, who prepared the volume for the press, yet as the decision has been made the subject of some comment among the profession, I have thought it advisable to give somewhat more fully the facts which appeared upon the record. Molere, the former owner, gave a mortgage to the Bank of North America for \$3867, and after his death the mortgaged premises descended to the plaintiff and defendant as two of three heirs in intestacy. On the 26th of August 1839, the plaintiff sold to the defendant his undivided third part of the premises by a deed whose consideration was expressed to be \$3000, and which contained a special covenant of warranty, and on the same day the defendant gave a mortgage to the plaintiff of two undivided third parts (viz. that which had descended to her, and that which she had just purchased,) for the same amount, of which \$500 was to be paid Nov. 20th, 1839; \$1000 on Nov. 20th, 1840; \$1000 on Nov. 20th, 1841; and the balance of \$500 on Nov. 20th, 1842. At the time of this purchase the mortgage to the Bank had been reduced to \$1667. The first instalment was regularly paid. Afterwards the payments were—

To the Plaintiff.		To the Bank,	
Nov. 20, 1840,	\$800 00	Dec. 24, 1839,	\$100 00
Feb. 11, 1841,	15 10	Feb. 12, 1840,	200 00
Nov. 20, 1841,	805 00	Aug. 5, 1840,	400 00
		Jan. 15, 1841,	400 00
		Oct. 16, 1841,	500 00
		Aug. 19, 1842, in full,	80 00

One-third of these payments to the Bank the defendant claimed to deduct from the balance due on the plaintiff's mortgage, and called a witness who

The decision must therefore be put upon the ground that a distinction exists between a defect of title and an incumbrance, and as in an executory contract the purchaser has an undoubted right either to have in-

swore that he went with her to make the purchase—that she took the plaintiff's offer to sell his share for \$3000—the witness thought that \$2500 was its value. The plaintiff then called a witness who swore that she was present when the contract was made—the plaintiff asked \$3000, and the defendant insisted on his taking less, saying there was a claim of the Bank. She finally agreed to give \$3000, in four different payments, and to take the business of the Bank on herself. After the bargain was made she spoke of the amount to be paid to the plaintiff and the Bank. On cross-examination the witness stated that the defendant came three times—she said she would pay the claim of the Bank—she would be responsible—she would take it on herself, what Mr. Moliere owed the Bank—she said the plaintiff was to have \$3000 paid to him in lawful money. The defendant's witness being recalled, then swore that he could not be mistaken about the contract, the defendant thought she bought the plaintiff's share for \$3000; that was a full price for it; it might have been agreed that the defendant was to pay the Bank mortgage as part of the consideration, but he felt sure she was not to pay any amount beyond the \$3000. Upon this evidence the Court below charged, that if the jury believed the defendant had notice, the plaintiff was entitled to recover: while on the other hand the Supreme Court held that the defendant should have had a positive instruction in her favor. The cases, however, cited in the opinion were not similar in their circumstances to *Wolbert v. Lucas*. In *Christy v. Reynolds*, 16 Serg. & Rawle, 258, and *Todd v. Gallagher*, id. 261, the incumbrances were covered by the covenants. In *Poke v. Kelly*, 13 id. 165, no deed seems to have been executed; and if there were one, it must have contained a general warranty. In *Withers v. Atkinson*, 1 Watts, 236, the purchaser was ignorant of the incumbrances, relying on the vendor's statement that, "there was not a judgment against him under the canopy of heaven." The incumbrances, moreover, were all removed by the vendor before the trial. The late case of *Forster's Exrs. v. Gillam*, 1 Harris, 340, turned upon misrepresentation by the vendor. There was a defect of title, and Mr. Justice Burnside, who delivered the opinion of the Court in *Wolbert v. Lucas*, said, "A special warranty does not prevent a vendee from setting up a defence to the unpaid portion of the purchase money, and in such a case the *onus* lies on the vendor to show he bought at his own risk."

This it is apprehended he can in general do, by merely proving notice on the part of the purchaser; and if the latter has taken no covenant, the presumption arising from the presence of notice, and the absence of a covenant, is such as to throw, in turn, on the purchaser the burden of proving that he did not intend to run the risk of the title.

cumbrances paid off by his vendor or to discharge them himself, and deduct the amount thus paid from that of the purchase money, so these principles must be applied to an executed contract irrespectively of the terms in which it is expressed ; and although the purchaser's right while the contract is executory, applies equally with respect to known defects of title and incumbrances, yet that the former being insusceptible of definite valuation are not thus to be presumed to have been excepted from the consideration.¹

¹ Such a distinction was expressly taken by the Court. "This is not like the case of *Lighty v. Shorb*, so much relied on. There the defect was on the face of the title, purchased by the defendant, and the maxim of *caveat emptor* entered. Equity would not interfere, because it would have been changing the terms of the bargain. This case is very different. Here, the plaintiff sold one-third of the premises for the consideration of \$3000, the price he asked for the estate, and for which she gave her mortgage." It ought to be distinctly observed that in *Lighty v. Shorb*, the defect was covered by the covenants. See, *supra*, p. 558.

It seems impossible that the decision of the Court in *Wolbert v. Lucas*, could in any way have proceeded upon the ground that the consideration named in the deed was conclusive evidence of its amount, as such is neither the law of Pennsylvania, nor does it generally prevail in this country. See the cases cited, *supra*, p. 77.

The case of *Ross's Appeal*, 9 Barr, 491, which was decided but a few weeks before *Wolbert v. Lucas*, may also be referred to in this connection. Patterson having agreed to purchase a tract of land, entered upon it and partially built a furnace. He afterwards agreed to transfer his interest to Lyman, who was to succeed to all his liabilities for the purchase money, and who subsequently, by a verbal arrangement, transferred to Marshall & Kellog all his interest in the land, and made a bill of sale to them of the fixtures. Lyman and Marshall & Kellog, both having subsequently made assignments for benefit of creditors, the assignee of the former claimed a dividend out of the estate of the latter, which was resisted on the ground that there were judgments against Patterson which were liens on the fixtures sold by Lyman. But it was also proved that at the time of the purchase, Marshall & Kellog knew of these judgments and consulted counsel, who advised they were not liens ; and Mr. Justice Bell, who delivered the opinion of the Court said, "Marshall means, that at the time of their contract with Lyman, his firm had notice of the judgments recovered against Patterson, but not deeming them to be liens on the land, he disregarded them. It is obvious from this, that neither of the parties imagined that Lyman had engaged to war-

3. While on the one hand the absence of a covenant, including a defect of which the purchaser has notice, raises a presumption that he intended to run the risk of it; so, on the other, where the purchaser has notice of either a defect or incumbrance, and there is a covenant which includes it, the presumption arises that the covenant was expressly taken for protection against it, and the purchase money cannot be detained unless the covenant has been broken; in other words, as has been clearly stated, "the purchaser shall be bound to perform his engagements wherever his knowledge and the state of facts continue to be the same as they were at the time of the conveyance."¹ Thus, where² the plaintiff had con-

ranted his vendee's title, either to the land or the fixtures. Marshall & Kellog undertook to decide for themselves, whether the judgments were or were not incumbrances; and never dreamed of looking to Lyman to guaranty them against a mistake in this particular. But apart from the direct proof, the nature of the transaction shows this to have been so. The case presents the uncontradicted fact, that Marshall & Kellog were to take the place of Lyman. As already said, Lyman intended to do nothing more than to transfer to them his interest, whatever it was, in the contract. Why, then, should he be made answerable for incumbrances not suffered by him, any more than for a defect of title? The very character of the agreement repels such an idea, as is shown authoritatively by *Smith v. Sillyman*, 3 Wh. 589. In that case, where there was a similar arrangement, it is truly said the presumption is irresistible, in the absence of express stipulation, that the vendee relied on his own judgment as to the soundness of the title. *The same presumption is applicable to an incumbrance.* Such an agreement amounts to a declaration by the vendee, that he takes the property just as his vendor received and held it, and subject to all defects or hindrances not created by the latter." See *Smith v. Sillyman*, *infra*, p. 568. It may be difficult to reconcile some of the expressions in the cases; but in these, as in many other instances, the student may recur to the apt language of Mr. Chief Justice Gibson in a recent case: "From a series of cases, the law has become a series of principles; and to keep them in harmony with each other, will conduce more to safety and certainty, than would an implicit obedience in every case to precedent." *Good v. Mylin*, 8 Barr, 55.

¹ Per Gibson, Ch. J., in *Lighty v. Shorb*, 3 Penn. R. 447; and see *Horback v. Gray*, 8 Watts, 497; and the remarks of Kennedy, J., in *Ives v. Niles*, 7 Watts, 328.

² *Fuhrman v. Loudon*, 13 Serg. & Rawle, 386.

veyed to the defendant a tract of land devised to him by his father, with a covenant of warranty against each and all the heirs of the father and all other persons, the purchaser in an action against him for the purchase money, set up as a defence that the land was subject to certain legacies charged upon it by the father of the vendor, and requested the Court to charge that if the jury believed these legacies were unpaid, the defendant was entitled to a deduction to the amount of them; but the Court charged that where the incumbrances with all the circumstances attending them were known both by vendor and vendee, and the latter took from the former a deed warranting particularly against those incumbrances, it was no defence to payment of the purchase money to say that the incumbrance was still subsisting; and the Court left it to the jury to determine whether both parties knew of these legacies charged upon the land, and whether any circumstances had occurred rendering the situation of the defendant more perilous than at the time of giving his bonds for the purchase money. This direction the Supreme Court held to be perfectly correct.¹ So where² a recital showed that the title to the land was in the wife of the patentee, who after her death conveyed it to two of his daughters and their husbands, who in turn conveyed to the vendor, giving the bond of the patentee as a security for the title, which bond was handed to the defendant when he purchased and took a deed with general warranty; it was held that it was impossible

¹ So in *Stroehecker v. Hansel*, Com. Pleas of Lancaster County, 5 Penn. Law Journal, 330.

² *Lighty v. Shorb*, 3 Penn. R. 447.

to doubt¹ that the mutual understanding was that the purchase money was not to be detained as a security for the title.¹ So, where² it appeared that the defendant on making the purchase was informed of an outstanding claim and then took a deed with general warranty, it was held that his remedy, if disturbed, must be upon his covenant, and that he could not detain the purchase money. So in a recent case,³ it

¹ In the absence, it is presumed, of evidence to the contrary.

² It was said, moreover, that the mercantile character of the security given for the purchase money, a draft of one of the partner vendees in the firm at twenty-two days, sufficiently attested that nothing but punctual and prompt payment was considered to stand with the contract. So, in *Smith v. Sillyman*, 3 Whart. 589, a vendor entered into articles to sell certain land to one who assigned the articles to the plaintiff, who entered into articles with the defendants, in which it was provided that the first payment of the purchase money was not to be made to the plaintiff until they were fully satisfied as to the title. A deed was afterwards executed with general warranty by the original vendor to one of the defendants, who, it was held, could not in an action brought by the plaintiff to recover the purchase money due him, set up as a defence that the title was defective, in consequence of which they failed in an attempt to recover the land by ejectment. "From the very nature of the agreement, in the absence of any express stipulation to the contrary, it would seem that the vendor (of the articles) did not intend to warrant the title to the premises, but that the vendees took the risk, relying on their own judgment as to the soundness of the title and for indemnity on the original vendor. That this was the understanding, is further shown from the agreement and the conduct of the parties. It is expressly agreed, (and the security of the vendees is said to be the object,) that the first payment shall not be made until the vendees are fully satisfied as to the title to the land. This shows that for this purpose they depended on their own judgment. When the title is fully established to their satisfaction, (for so I read the contract,) the vendees bind themselves to take the deed. By the agreement, a reasonable time is allowed to investigate the title for themselves. Until then a defect of title would undoubtedly be a good defence; but after having examined it for themselves, and accepted the title, they are foreclosed from taking any defence, on the ground of a failure of consideration, so far as the present plaintiff is concerned. This construction is necessary for the protection of the plaintiffs, as they would have no remedy on the covenant against the original vendor."

³ *Bradford v. Potts*, 9 Barr, 37.

⁴ *Juvenal v. Jackson*, 2 Harris, 519.

was said that a vendee who takes a covenant against a known defect in the title shall not detain the purchase money as a further security against it, for the reason that the covenant would be nugatory if he did.¹

Where, however, the covenant is broken at the time of the suit brought to recover the purchase money, the purchaser will, on the general principles already referred to,² for the purpose of preventing circuity of action, be entitled to detain the purchase money to the extent to which he would be at that time entitled to recover damages upon the covenant.³

¹ In *Share v. Anderson's Ex'rs.* 7 Serg. & Rawle, 43, the vendor's title was subject to a charge in favor of his mother and sisters. At the time of making the contract of sale, he promised the purchaser that he would procure releases of these charges, but not being able to do so, the deed was executed with a covenant to indemnify against all estates, charges, incumbrances, &c., and a covenant of general warranty. Releases were afterwards obtained from all but two of the parties, and in an action to recover the purchase money, the defendant set up (besides an allegation of fraud) the existence of these charges and a quit rent, which he contended had prevented him from reselling, which was the special object of his purchase. Under the charge of the Court, whose judgment was affirmed on error, the jury made a deduction for the amount of the outstanding charges, and also such arrearages of quit rent as should be then due. "These, as being a present charge, were properly a subject of defence, on the same ground as the liens created by the proceedings in the Orphans' Court were allowed, but the vendee could not retain to meet charges accruing afterwards."

² *Supra*, p. 490, *et seq.*

³ *Christy v. Reynolds*, 16 Serg. & Rawle, 258; *Todd v. Gallagher*, *id.* 261; *Morris v. Buckley*, 11 *id.* 158; *Ives v. Niles*, 5 Watts, 323; *Poyntell v. Spencer*, 6 Barr, 257.

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